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United Nations

Report of the United Nations Commission on International Trade Law

Forty-fourth session
(27 June-8 July 2011)

General Assembly
Official Records
Sixty-sixth session
Supplement No. 17

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Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the forty-fourth session of the Commission, held in Vienna from 27 June to 8 July 2011.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

II. Organization of the session

A. Opening of the session

3. The forty-fourth session of the Commission was opened on 27 June 2011.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 22 May 2007, on 3 November 2009 and on 15 April 2010, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:[1] Algeria (2016), Argentina (2016), Armenia (2013), Australia (2016), Austria (2016), Bahrain (2013), Benin (2013), Bolivia (Plurinational State of) (2013), Botswana (2016), Brazil (2016), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2016), Czech Republic (2013), Egypt (2013), El Salvador (2013), Fiji (2016), France (2013), Gabon (2016), Georgia (2015), Germany (2013), Greece (2013), Honduras (2013), India (2016), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2013), Jordan (2016), Kenya (2016), Latvia (2013), Malaysia (2013), Malta (2013), Mauritius (2016), Mexico (2013), Morocco (2013), Namibia (2013), Nigeria (2016), Norway (2013), Pakistan (2016),

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 30 were elected by the Assembly at its sixty-first session, on 22 May 2007 (decision 61/417), 28 were elected by the Assembly at its sixty-fourth session, on 3 November 2009 and two were elected by the Assembly at its sixty-fourth session, on 15 April 2010. By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election. The following six States members elected by the Assembly on 3 November 2009 agreed to alternate their membership among themselves until 2016 as follows: Belarus (2010-2011, 2013-2016), Czech Republic (2010-2013, 2015-2016), Poland (2010-2012, 2014-2016), Ukraine (2010-2014), Georgia (2011-2015) and Croatia (2012-2016).

Paraguay (2016), Philippines (2016), Poland (2012), Republic of Korea (2013), Russian Federation (2013), Senegal (2013), Singapore (2013), South Africa (2013), Spain (2016), Sri Lanka (2013), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2016) and Venezuela (Bolivarian Republic of) (2016).

5. With the exception of Armenia, Bahrain, Benin, Botswana, Fiji, Gabon, Georgia, Greece, Latvia, Malta, Morocco, Pakistan, Senegal, South Africa and Uganda, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Afghanistan, Angola, Belarus, Belgium, Costa Rica, Croatia, Cuba, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, Guatemala, Indonesia, Iraq, Kuwait, Panama, Peru, Portugal, Qatar, San Marino, Saudi Arabia, Slovakia, Slovenia, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Uruguay and Yemen.

7. The session was also attended by observers from Palestine and the European Union.

8. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: United Nations Conference on Trade and Development (UNCTAD), United Nations Economic Commission for Europe and the World Bank;

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization, Inter-Parliamentary Assembly of the Eurasian Economic Community, International Development Law Organization, International Institute for the Unification of Private Law (Unidroit), Organization for Security and Cooperation in Europe (OSCE) and the World Customs Organization;

(c) *Invited non-governmental organizations*: Asociación Americana de Derecho Internacional Privado, Association droit et méditerranée (Jurimed), China International Economic and Trade Arbitration Commission, Comité Maritime International, European Company Lawyers Association, Forum for International Conciliation and Arbitration, International Air Transport Association, International Chamber of Commerce, International Credit Insurance and Surety Association, International Law Institute, Moot Alumni Association and New York State Bar Association.

9. The Commission welcomed the participation of international non-governmental organizations with expertise in the major items on the agenda. Their participation was crucial to the quality of texts formulated by the Commission, which requested the Secretariat to continue to invite such organizations to its sessions.

C. Election of officers

10. The Commission elected the following officers:

Chair:	Salim MOOLLAN (Mauritius)
Vice-Chairs:	Marek JEZEWSKI (Poland) Carlos SÁNCHEZ MEJORADA Y VELASCO (Mexico) Tore WIWEN-NILSSON (Sweden) (elected in his personal capacity)
Rapporteur:	Mr. Kah Wei CHONG (Singapore)

D. Agenda

11. The agenda of the session, as adopted by the Commission at its 925th meeting, on 27 June 2011, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and adoption of the UNCITRAL Model Law on Public Procurement.
5. Finalization and adoption of judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency.
6. Arbitration and conciliation:
   (a) Progress reports of Working Group II; and
   (b) Mediation in the context of settlement of investor-State disputes.
7. Online dispute resolution: progress reports of Working Group III.
8. Insolvency law: progress report of Working Group V.
9. Security interests: progress reports of Working Group VI.
10. Current and possible future work in the area of electronic commerce.
11. Possible future work in the area of microfinance.
12. Endorsement of texts of other organizations: 2010 revision of the Uniform Rules for Demand Guarantees published by the International Chamber of Commerce.
13. Monitoring implementation of the New York Convention.
14. Technical assistance to law reform.
15. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts.
16. Status and promotion of UNCITRAL legal texts.

17. Coordination and cooperation:

(a) General;

(b) Coordination in the field of security interests;

(c) Reports of other international organizations;

(d) International governmental and non-governmental organizations invited to sessions of UNCITRAL and its Working Groups.

18. Role of UNCITRAL in promoting the rule of law at the national and international levels.

19. International commercial arbitration moot competitions.

20. Relevant General Assembly resolutions.

21. Other business.

22. Date and place of future meetings.

23. Adoption of the report of the Commission.

E. Adoption of the report

12. At its 941st and 942nd meetings, on 8 July 2011, the Commission adopted the present report by consensus.

III. Finalization and adoption of the UNCITRAL Model Law on Public Procurement

A. Introduction

13. The Commission recalled its previous discussions on the UNCITRAL Model Law on Procurement of Goods, Construction and Services[2] of 1994 and its decision to entrust the drafting of proposals for revision of the 1994 Model Law to Working Group I (Procurement).[3] The Commission noted that the Working Group had begun its work on the revision at its sixth session, held in Vienna from 30 August to 3 September 2004, and completed its work at its nineteenth session, held in Vienna from 1 to 5 November 2010. At its twentieth session, held in New York from 14 to 18 March 2011, the Working Group had commenced work on the preparation of a revised Guide to Enactment.[4]

14. The Commission had before it at the current session: (a) the draft revised text of the Model Law on Public Procurement resulting from the nineteenth session of

[2] United Nations publication, Sales No. E.98.V.13.

[3] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 81 and 82.

[4] For the reports of the Working Group on the work of its sixth to twentieth sessions, see A/CN.9/568, A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640, A/CN.9/648, A/CN.9/664, A/CN.9/668, A/CN.9/672, A/CN.9/687, A/CN.9/690, A/CN.9/713 and A/CN.9/718, respectively.

the Working Group, with an accompanying note by the Secretariat (A/CN.9/729 and Add.1-8); (b) a compilation of comments from Governments on that draft Model Law received by the Secretariat before the forty-fourth session of the Commission (A/CN.9/730 and Add.1 and 2); (c) a working draft of the Guide to Enactment to accompany the draft Model Law (A/CN.9/731 and Add.1-9 and A/CN.9/WG.I/WP.77 and Add.1-9); and (d) the reports on the nineteenth and twentieth sessions of the Working Group (A/CN.9/713 and A/CN.9/718).

15. The Commission proceeded with the consideration of the draft Model Law. The Commission noted that the working draft of the Guide to Enactment was not to be considered during the session but was to be used only for reference to assist the Commission in consideration of the provisions of the draft Model Law. The Commission agreed to consider substantive issues first and drafting issues thereafter.

B. Consideration of the draft UNCITRAL Model Law on Public Procurement

16. It was agreed that references throughout the Model Law to "the member of the public", the "general public" and the like should be replaced with references to "any person".

Preamble

Subparagraph (b): the phrase "regardless of nationality"

17. Concern was expressed about the wording of the subparagraph in that it did not reflect the primary purpose of public procurement in many developing countries: to promote development of the domestic market and to encourage participation in the procurement proceedings of national suppliers or contractors. It was noted that the Guide explained the flexibility of the Model Law in that regard.

Subparagraph (d): the term "equitable"

18. It was proposed to change the term "equitable" to "equal". It was explained that the term "equitable" encompassed the same concept as "fair", which was already in the subparagraph and different in substance from the term "equal". Concern was also expressed that the term "equitable" was open to different interpretations and possible misuse, such as favouritism, and that difficulties would be encountered in the enforcement of the concept of "equity" (from which the principle "equitable treatment" derived).

19. Opposition was expressed to changing the term as it appeared in the draft and in the 1994 text, in particular because the term "equitable" was considered to be more flexible and already encompassed the principle of "equal treatment". Concern was also expressed that a greater number of challenges might ensue from suppliers or contractors claiming that they were treated unequally. Other delegations urged flexibility as regards the use of either term, on the condition that the Guide would explain that participants in procurement proceedings ought to be treated equally in identical situations but might be treated differently in different circumstances.

20. The Commission agreed to refer in the subparagraph to "fair, equal and equitable treatment" of all suppliers and contractors and explain in the Guide the meaning of that phrase.

Chapter I. General provisions

Article 2

21. The understanding was that all definitions in the article would be listed in alphabetical order in all language versions of the final text.

22. It was agreed that the beginning of definition (e) should read "'framework agreement procedure' means a procedure".

23. It was further agreed that the article should contain new definitions of "pre-qualification" and "pre-selection", which would read as follows: "'Pre-qualification' means the procedure set out in article 17 to identify, prior to solicitation, suppliers or contractors that are qualified;" and "'Pre-selection' means the procedure set out in article 48 (3) to identify, prior to solicitation, a limited number of suppliers or contractors that best meet the qualification criteria for the procurement concerned."

24. It was proposed and agreed to delete the words in parentheses ("the 'subject matter of the procurement'") in definition (h). While the broadly held view was that there should be a definition of the subject matter of the procurement, which should be drafted so as to allow the appropriate use of the term throughout the Model Law, views varied on the wording. The proposal was made that such a definition should draw on article 36, subparagraph (b), with the addition of the words "if appropriate" after the word "including".

25. The alternative view was expressed that no such definition should be included, since the term was to be defined in each procurement, not in the law. It was believed that the subject matter of a procurement was a question of fact which could not easily fall under a generic definition and that it was therefore better to leave such a definition open and to include the discussion on that subject in the Guide.

26. The Commission deferred its decision on the proposal to a later stage.

27. After subsequent discussion, it was agreed that no definition of the subject matter of the procurement should be included in the Model Law. It was understood that the Guide would explain the term "subject matter of the procurement" used throughout the Model Law, including by drawing on provisions of article 36, subparagraph (b), or by stating that the "subject matter of the procurement" was what the procuring entity described as such at the outset of the procurement proceedings.

28. The Commission agreed that definition (o), "solicitation", should be expanded to refer to an invitation to tender, present submissions or participate in request-for-proposals proceedings or an electronic reverse auction but should not cover invitations for pre-qualification or for pre-selection.

Article 5, paragraph 1

29. The Commission agreed to delete the following words: "Except as provided for in paragraph (2) of this article, the text of". It was the understanding that the

Guide would clarify that paragraph 1 dealt with legal texts that did not encompass any internal documents (not being of general application) or case law (being covered by paragraph 2 of the article).

Article 8, paragraph 4

30. A query was raised as to whether the phrase "reasons and circumstances" referred to factual and legal justifications for the decision of the procuring entity. The discussion of that term in the Working Group was recalled, and it was noted that the decision of the Working Group to use that term should not be reopened.

31. It was agreed that the current wording would be retained, with the Guide explaining that in some jurisdictions the procuring entity would need to substantiate the reasons and circumstances with legal justifications, which would be reflected in relevant domestic enactments as necessary.

Article 9, paragraphs 2 (f) and 8 (a)

32. It was agreed that consistency between paragraphs 2 (f) and 8 (a) as regards references to "false statements" and "misrepresentations" should be ensured. It was agreed to add a reference to "misrepresentation" in paragraph 8 (a).

Article 9, paragraph 8 (b)

33. Views differed on whether the phrase "may disqualify" should be replaced with "shall disqualify". One view was that the procuring entity ought to be required to disqualify suppliers or contractors if they presented materially inaccurate or materially incomplete information; the other view was that such flexibility should be preserved, in particular to allow for clarifying whether an error or omission was deliberate or a simple mistake. Concerns were raised about the negative impact of automatic disqualification on competition and an increased number of challenges if the proposed change was introduced.

34. The Commission agreed that the term "materially inaccurate or materially incomplete" should be clarified in all language versions and the concept explained in the Guide. The need for a clarification procedure in the context of ascertainment of the qualifications of suppliers or contractors (similar to the one that existed in the context of abnormally low submissions under article 19 and in tendering proceedings under article 42 was considered in that context. (For further consideration of this issue, see paras. 48-53 below.)

35. Accordingly, the Commission agreed to retain the wording of article 9, paragraph 8 (b).

Article 10

36. It was agreed that paragraph 1 should be redrafted as follows: "(a) The pre-qualification or pre-selection documents, if any, shall set out a description of the subject matter of the procurement; (b) The procuring entity shall set out in the solicitation documents the detailed description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be

applied." It was proposed that the Guide would highlight that paragraphs 1 (a) and 2 (a) of article 29 catered for situations in which there was no such detailed description.

37. It was further agreed to make the following changes: in paragraph 3 the words "including concerning" should be deleted, and paragraph 3 should read as follows: "(3) The description of the subject matter of the procurement may include, inter alia, specifications, plans, drawings, designs, requirements, testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology."; the beginning of paragraph 4 should read "To the extent practicable, the description of the subject matter"; and the phrase "the relevant technical, quality and performance characteristics" should be used in paragraph 4 and elsewhere in the text of the Model Law as appropriate.

38. It was proposed that the second sentence in paragraph 4 should also prohibit the use of "specific production methods" in descriptions, so as to avoid the use of discriminatory requirements for prescribed methods in order to favour certain suppliers.

39. Views varied as regards the proposal. It was suggested that, if the reference to "specific production methods" were included, the accompanying Guide text should state as follows: "With regard to specified production methods, and with due regard to paragraph (5), which calls for standardized technical requirements, in some cases there may be no equivalent production methods and the solicitation may so note."

40. The proposal was subsequently withdrawn. It was noted in particular that the original wording as appeared in the draft and in the 1994 text was traced back to the wording of equivalent provisions of the 1994 Agreement on Government Procurement of the World Trade Organization (WTO)[5] and that in some procurement methods specification of the production method was essential for ensuring quality.

41. The Commission agreed that the Guide text would discuss the risks of discrimination where specific production methods were mentioned by drawing attention to the prohibition against discriminatory treatment in paragraph 2 of article 10.

Article 11

42. It was proposed that the phrase in paragraph 3 "and expressed in monetary terms" should be replaced with "and/or expressed in monetary terms", since it would not always be possible to express all evaluation criteria in monetary terms. The understanding of some delegations was that the words "to the extent practicable", if applied to all three requirements in the provision (that the evaluation criteria must be objective, quantifiable and expressed in monetary terms), would achieve the same result as the proposed redraft. Concern was expressed, however, that such a caveat should not apply to evaluation criteria in electronic reverse auctions where it was required that all evaluation criteria should be quantifiable and expressed in monetary terms for such auctions to be held. (The relevant provision

[5] Agreement on Government Procurement, article VI, para. 3; available from www.wto.org/english/tratop_E/gproc_e/gp_gpa_e.htm.

requiring a formula in electronic reverse auctions would be explained in the Guide.) The Commission deferred its decision on the wording of the article to a later stage.

43. After subsequent discussion, it was agreed that: paragraph 2 chapeau and subparagraph (a) should read as follows: "The evaluation criteria relating to the subject matter of the procurement may include: (a) Price"; paragraph 3 should be redrafted as follows: "To the extent practicable, all non-price evaluation criteria shall be objective, quantifiable and expressed in monetary terms," with the Guide explaining that the expression "in monetary terms" would not be applicable to all cases; in paragraph 4 (b), after the words "domestically produced goods," the words "or any other preference" should be added; paragraph 5 (b) should be redrafted as follows: "All evaluation criteria established pursuant to this article, including price as modified by any preference;" and paragraph 5 (c) should be redrafted as follows: "The relative weights of all evaluation criteria, except where the procurement is conducted under article 48, in which case the procuring entity may list all evaluation criteria in descending order of importance."

Article 13

44. It was agreed that the wording of the article should not change but that the Guide should discuss the options in the text regarding the languages to be used in the pre-qualification, pre-selection and solicitation documents.

Article 14

45. It was agreed to add in paragraph 1 the word "in" before the words "the pre-qualification or pre-selection documents".

46. It was understood that any changes made to the solicitation, pre-qualification or pre-selection documents in accordance with article 14 would be material and therefore covered by paragraph 3 of article 15; the link between the provisions would be highlighted in the Guide.

Article 15, paragraph 1

47. It was agreed to replace the phrase "such time as will" with the phrase "a time period that will" in the third sentence.

New article 15 bis on clarification of qualification information and of submissions

48. The attention of the Commission was drawn to the provisions in document A/CN.9/730 on clarification of qualification data and submissions. The Commission considered whether a generic article on clarification of qualification data and submissions should be added in chapter I of the Model Law or whether the subject should be dealt with in all relevant articles. While some delegations preferred the former approach, others preferred the latter, in particular because it allowed adapting provisions on clarification to suit the various procedures, taking into account, in particular, points of time when the need to request clarification might arise.

49. In discussion of articles 45 and 46, the point was made that any provisions providing for the right of the procuring entity to seek clarification should be coupled with a prohibition against entering into negotiations during such clarification

procedures. It was noted that such a prohibition would be in addition to the prohibition of negotiations included in the context of some methods of procurement, such as under article 45.

50. It was also pointed out that certain paragraphs of article 46 illustrated the varying points of time in request-for-proposals-without-negotiation proceedings at which the procuring entity might wish to ask for clarification. It was noted that the generic article on clarification of qualification data and submissions should take into account that such points of time would vary depending on procurement methods and when qualifications were assessed.

51. It was subsequently agreed that paragraph 1 of article 42 should be used as a basis for drafting a generic article on clarification of qualification data and submissions to be included in chapter I. It was also agreed that that generic article would in addition reflect: (a) that the procedure involved a clarification procedure, and not negotiations; and (b) that a complete record of the exchange of all information during the clarification procedure ought to be included in the record of the procurement proceedings under article 24. The Commission agreed to consider the draft provision at a later stage.

52. Later in the session, it was agreed to include the following new article in the Model Law:

> **"Article 15 bis. Clarification of qualification information and of submissions**
>
> 1. At any stage of the procurement proceedings, the procuring entity may ask a supplier or contractor for clarifications of its qualification information or of its submission, in order to assist in the ascertainment of qualifications or the examination and evaluation of submissions.
>
> 2. The procuring entity shall correct purely arithmetical errors that are discovered during the examination of submissions. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that presented the submission concerned.
>
> 3. No substantive change to qualifications information, and no substantive change to a submission (including changes aimed at making an unqualified supplier or contractor qualified or an unresponsive submission responsive), shall be sought, offered or permitted.
>
> 4. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to qualification information or submissions, nor shall any change in price be made, pursuant to a clarification that is sought under this article.
>
> 5. Paragraph (4) of this article shall not apply to proposals submitted under article 48, 49, 50 or 51.
>
> 6. All communications generated under this article shall be included in the record of the procurement proceedings."

53. It was understood that the Guide should elaborate on the difference between a change in price and a correction of the price.

Article 16, paragraph 1 (c)

54. The need for subparagraph (ii) was questioned given the similar wording in paragraph 1 (b). The Commission deferred the consideration of the wording of paragraph 1 (c) to a later stage.

55. After subsequent discussion, it was agreed to delete subparagraph (ii) and merge subparagraph (i) with the chapeau provisions of subparagraph (c).

Article 17, paragraph 2

56. It was proposed that the procurement regulations, not the Law, should identify a publication in which an invitation to pre-qualify should be published. The Commission agreed with the proposed wording to that end in document A/CN.9/730. The understanding was that the same change would be made throughout the Model Law to equivalent provisions.

57. Reflecting that agreement, as well as the agreement reached at the session as regards the revisions to be made in paragraph 2 of article 32 of the draft (see paras. 92-99 below), the Commission agreed to revise paragraph 2 as follows: "(2) If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published in the publication identified in the procurement regulations. Unless decided otherwise by the procuring entity in the circumstances referred to in article 32 (4) of this Law, the invitation to pre-qualify shall also be published internationally, so as to be widely accessible to international suppliers or contractors."

Article 17, paragraph 3 (b)

58. The Commission deferred the consideration of a proposal to replace the word "timetable" with the phrase "envisaged or indicative timetable". The view was expressed that the wording already allowed for sufficient flexibility.

59. After subsequent discussion, it was agreed to replace the phrase "as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services" with the phrase "as the desired or required time for the supply of the goods, for the completion of the construction, or for the provision of the services;".

Article 19, paragraphs 1 (c) and 2

60. It was agreed that subparagraph (c) should be deleted and the following wording should replace paragraph 2: "The decision of the procuring entity to reject a submission in accordance with this article and the reasons for that decision, and all communications with the supplier or contractor under this article shall be included in the record of the procurement proceedings. The decision of the procuring entity and the reasons therefor shall be promptly communicated to the supplier or contractor concerned." It was the understanding that, as a consequence, changes would be introduced in paragraph 1 as follows: "and" would be added after subparagraph (a), and "and" after subparagraph (b) would be deleted.

Article 20

61. Regarding a comment in document A/CN.9/730/Add.1, the prevailing view was that no *de minimis* threshold should be introduced in paragraph 1, in order to be consistent with international anti-corruption regulations that linked, as did paragraph 1 of the draft, the relevant act of the supplier or contractor to its intention to influence an act or decision of the procuring entity. The understanding was that the Guide would explain the relevant issues, with reference to national provisions and practices, and should indicate that even small items could constitute inducements in some circumstances.

62. Regarding another comment in document A/CN.9/730/Add.1, it was agreed that no additional language to clarify the notion of "unfair competitive advantage" in paragraph 1 (b) should be added. Support was expressed for the current approach in the draft Guide encouraging enacting States to consider the issue in the light of the prevailing circumstances (and the use of examples was suggested, such as that a supplier or contractor that had drafted a description should not be permitted to participate because it would have such an unfair advantage, an example also referred to in the 1994 WTO Agreement on Government Procurement. The importance of considering competition issues not only in the context of a particular procurement proceeding but also in the light of the competition policies of States at a macroeconomic level was highlighted.

Article 21, paragraph 2 (c)

63. The Commission agreed that the duration of the standstill period was to be established by the procuring entity in the solicitation documents and in accordance with the requirements of the procurement regulations. It was the understanding that the procurement regulations might fix different minimums for different types of procurement and that the Model Law would require the procurement regulations to address the standstill period(s).

Article 21, paragraph 3 (b)

64. It was agreed that the paragraph should be replaced with the following wording: "Where the contract price is less than the threshold amount set out in the procurement regulations; or". It was noted that that change would make the wording consistent with the drafting of the relevant part of paragraph 2 of article 28.

Article 21, paragraph 7

65. The proposal was made to include at the end of the last sentence the phrase "unless the extension has been granted to the procuring entity by suppliers or contractors that presented submissions and the entities that provided the tender security." The Commission noted the related provisions in article 40 of the draft and deferred its decision on the drafting to a later stage.

66. After subsequent discussion, it was ultimately agreed that the following provision (or its equivalent) should be introduced: "unless extended under article 40 (2)".

Article 22, paragraph 2

67. The Commission recalled its decision as regards article paragraph 3 (b) of article 21 (see para. 64 above) and agreed that a similar change would be made in paragraph 2 of article 22.

Article 23, paragraph 3

68. Concern was expressed about the reference to solicitation documents in the second sentence of the paragraph. Requiring suppliers or contractor to grant blanket ex ante consent to disclose confidential information during the procurement proceedings was considered to facilitate manipulation by the procuring entity. The Commission agreed to delete the phrase "or permitted in the solicitation documents" and to explain in the Guide that requiring consent to disclose such information should be carefully considered in the light of the potentially anti-competitive effect of doing so.

69. A question was also raised about the intended scope of the second sentence, and it was agreed to revise the draft to make it clear that the provisions applied only in the context of the procurement methods referred to in the first sentence.

70. After subsequent discussion, it was agreed that the paragraph should read as follows: "Any discussions, communications, negotiations and dialogue between the procuring entity and a supplier or contractor pursuant to paragraph 3 of article 47 and to articles 48 to 50 of this Law shall be confidential. Unless required by law or ordered by the [*name of the court or courts*] or the [*name of the relevant organ designated by the enacting State*], no party to any such discussions, communications, negotiations or dialogue shall disclose to any other person any technical, price or other information relating to these discussions, communications, negotiations or dialogue without the consent of the other party."

Article 24

71. It was proposed to add in the first sentence of paragraph 3 after the words "on request" the words "unless such information has not arisen in the procurement proceedings", with the explanation in the Guide that certain information listed in paragraph 1 of the article would not be available in all procurement proceedings, e.g., if they were cancelled. After discussion, it was decided that this proposal would not be retained.

72. The Commission considered the extent of disclosure of information listed in paragraph 1 (s) and 1 (t) and under paragraphs 3 and 4 (b) of the article and recalled that the aim was to provide for a general principle of transparency, which should be modified only to the extent necessary to prevent future collusion or other risks to competition. The Commission agreed to revise the provisions to ensure an appropriate balance and to consider the drafting at a later stage.

73. In further discussion, the Commission heard proposals to retain paragraph 1 (s) as drafted, to insert the phrase "for each submission" at the beginning of that paragraph and delete the words "of each submission" at the end, and to remove the reference to "the basis for determining the price" from the text.

74. It was subsequently suggested that reference to "the basis for determining the price" might be listed separately under paragraph 1. The importance of retaining

such a reference in paragraph 1 was emphasized in the light of the explanations in the 1994 "Guide to Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services"[6] regarding that provision and the importance of such information for the procuring entity, for example in investigating abnormally low submissions. It was further emphasized that this type of information was always commercially sensitive and therefore should not be accessible to competitors.

75. Subject to any further drafting changes to paragraph 1 (s), it was agreed that reference to paragraph 1 (s) would be retained in paragraph 3.

76. Views varied as regards the need to refer in paragraph 3 to cancellation of the procurement. The Commission decided to delete that reference. It was understood that, in the case of cancellation of the procurement, suppliers or contractors would not have an automatic right but rather would need to seek a court order to access the part of the record specified in paragraph 3.

77. After deliberation, the Commission decided to retain paragraph 4 unchanged, noting that it provided essential safeguards against improper disclosure of information contained in the record. Concern was nevertheless expressed about the reference to submission prices in paragraph 4 (b), which, it was suggested, should be reconsidered, taking into account the differences among various procurement methods, some of which, such as tendering, involved the disclosure of tender prices to all suppliers or contractors that submitted tenders. The Commission agreed to consider that point later in the session.

78. After subsequent discussion, it was agreed that the phrase in paragraph 1 (r) "the written procurement contract" should read "a written procurement contract", that the words "or the basis for determining the price" in paragraph 1 (s) should be deleted and that the words in paragraph 4 (b) "and submission prices" should be deleted.

79. It was proposed that paragraph 3 should read as follows: "Except as disclosed pursuant to article 41 (3) of this Law, the portion of the record referred to in subparagraphs (p) to (t) shall, on request, be made available to suppliers or contractors that presented submissions after the decision on acceptance of the successful submission of the procurement has become known to them, unless the procuring entity determines that disclosure of such information would impede fair competition. Disclosure of the portion of the record referred to in subparagraphs (s) and (t) may be ordered at an earlier stage only by the [*name of the court or courts*] or [*name of the relevant organ designated by the enacting State*]."

80. The inclusion of the words "of the procurement" in the proposal was questioned. It was also suggested that it would be advisable to add a reference to paragraph 1 after the reference to subparagraphs (p) to (t). The need for the phrase "unless the procuring entity determines that disclosure of such information would impede fair competition" was queried in the light of the content of paragraph 4 (a) of the article. The Commission deferred its decision on the proposal to a later stage.

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[6] For the text of the Guide, see document A/CN.9/403, which was reproduced in the *Yearbook of the United Nations Commission on International Trade Law*, vol. XXV: 1994 (United Nations publication, Sales No. E.95.V.20), part three, annex II. The Guide is available in electronic form from the UNCITRAL website at www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf.

81. After subsequent discussion, the Commission agreed to replace paragraph 3 with the following wording: "Subject to paragraph (4) of this article, or except as disclosed pursuant to article 41 (3) of this Law, the portion of the record referred to in subparagraphs (p) to (t) of paragraph (1) of this article shall, after the decision on acceptance of the successful submission has become known to them, be made available, on request, to suppliers or contractors that presented submissions."

82. It was agreed to reflect in the Guide the content of the deleted sentence of paragraph 3 as contained in document A/CN.9/729/Add.2 and that the procuring entity should notify suppliers or contractors of the disclosure of information from the record relevant to them.

Article 25

83. Concern was expressed about the scope of the article, which dealt only with the conduct of the procuring entity and not with the conduct of suppliers and contractors and was therefore considered to be too narrow. In the light of developments in the regulation of those issues at the national, regional and international levels, it was said to be essential for UNCITRAL to undertake work in that area so that the article could be supplemented by pertinent materials of UNCITRAL on that subject. The Commission agreed to consider the issue at a future session in the context of its consideration of future work of UNCITRAL in the area of public procurement.

Chapter II. Methods of procurement and their conditions for use. Solicitation and notices of the procurement

Article 26

84. In response to a query as to whether open framework agreements should be listed as a separate procurement method in paragraph 1 of the article, the Commission decided to retain the article unchanged.

Article 29, paragraph 1 (a)

85. It was proposed that the provision should read: "It is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement in accordance with article 10 of this Law, and the procuring entity assesses that discussions with suppliers or contractors are needed to refine aspects of the description of the subject matter of the procurement and to formulate them with the precision required under article 10 of this Law and in order to allow the procuring entity to obtain the most satisfactory solution to its procurement needs." Concern was expressed about the wording, since it did not fully reflect the conditions for use of two-stage tendering (in which a detailed description of the subject matter of the procurement might be provided at the outset of the procurement proceedings). The need for alignment of the text with paragraphs 2 and 3 of article 47 was highlighted. The Commission deferred a decision on the proposal to a later stage.

86. In subsequent discussion, it was agreed that the provision as drafted in document A/CN.9/729/Add.3 should be retained with a small drafting change: "The procuring entity assesses that discussions with suppliers or contractors are needed to refine aspects of the description of the subject matter of the procurement and to

formulate them with the detail required under article 10 of this Law, and in order to allow the procuring entity to obtain the most satisfactory solution to its procurement needs."

Article 29, paragraph 2 (c)

87. A query was raised as regards the interaction of paragraph 3 of article 27 and paragraph 2 (c) of article 29. The understanding was that referring only to national security would not be sufficient to fulfil the requirement of paragraph 3 of article 27 in such cases and that more explanation of the reasons and circumstances would be required in the record.

Article 30, paragraph 1 (a)

88. The Commission agreed to delete the words "and precise" from the paragraph, as article 10 as amended at the current session (see para. 36 above) referred only to a "detailed" and not to a "precise" description of the subject matter of the procurement.

Article 31, paragraph 1 (a)

89. It was suggested that the phrase "on an indefinite basis" should be replaced with the phrase "on an indefinite or repeated basis" or alternatively that the Guide should explain that the term "indefinite" encompassed the concept of repeated purchases. The alternative view was that a resort to framework agreements would always be justified in cases of indefinite demands, which might not necessarily arise on a repeated basis.

90. The Commission agreed to replace the phrase "on an indefinite basis" with the phrase "on an indefinite or repeated basis." It was also noted that the Guide would include a comment to the effect that indefinite needs would include circumstances in which the framework agreement was used to ensure security of supply.

Article 32, paragraph 1, and article 33, paragraph 5

91. The Commission recalled its decision in paragraph 57 above as regards paragraph 2 of article 17 and confirmed its understanding that it would also apply to paragraph 1 of article 32 and paragraph 5 of article 33.

Article 32, paragraph 2

92. Concern was expressed about the requirement in the paragraph to publish the invitation in a language customarily used in international trade, as that requirement would impose an unreasonable translation burden on developing countries (whose local languages were not customarily used in international trade). The point was made that the 1994 WTO Agreement on Government Procurement imposed the equivalent requirement only as regards publication of summary information about the procurement and not the solicitation documents. It was clarified that the provisions in the draft referred to the invitation rather than the solicitation documents.

93. The Commission agreed with the proposals that references to the language and any media (such as a newspaper or journal) should be removed from the provision

and that it should instead focus on the goal to be achieved: publication internationally so as to be accessible to international suppliers or contractors. The Commission deferred its consideration of revised wording to a later stage.

94. A representative of a multilateral development bank expressed concern about the proposed changes since they might result in provisions that would be inconsistent with the relevant requirements of the multilateral development banks.

95. After subsequent discussion, the Commission agreed that paragraph 2 should be replaced with the following wording: "The invitation shall also be published internationally, so as to be widely accessible to international suppliers or contractors."

96. Concern was expressed by the observers from a multilateral development bank and a development assistance organization about the change made to paragraph 2 of article 32 and paragraph 2 of article 17 regarding the language of publication, since the resulting wording, it was said, did not promote the participation of suppliers or contractors regardless of nationality, which was one of the objectives of the Model Law as stated in its preambular subparagraph (b). It was proposed that, if the new wording were to be retained, the Guide should clearly state why the changes were made.

97. The alternate view was expressed that the previous wording implied the use of the English language, which would not be appropriate, and that the revised wording reflected modern practices, such as the use of Internet-based communications.

98. To address the concerns of the observers, it was agreed that the Guide would explain that the revised text was technologically neutral (whereas the previous wording implied the use of paper-based media, by referring to a newspaper or a journal of wide international circulation) and was intended to accommodate modern methods of publication. It was also agreed that the Guide would describe the different ways in which the requirements for international publication could be fulfilled, in particular for those jurisdictions in which electronic publication was not possible, which would include the methods specified in the 1994 text.

99. The Commission agreed that the Guide should: (a) note that the provision would require that the publication be in a language that would in fact make it accessible to all potential suppliers or contractors in the context of the procurement concerned; and (b) alert enacting States that in WTO the provisions on the language of publication of procurement-related information (article XVII of the 1994 Agreement on Government Procurement) were considered to be an important safeguard with respect to achieving transparency and competition.

Article 32, paragraph 4

100. It was proposed that the words "in view of the low value" should be deleted. Objection was raised to the proposal on the basis that the resulting wording would allow unrestricted use of domestic procurement by the procuring entity. The alternative view was expressed that the provision should be redrafted to reflect that the costs of international publication (e.g. translation) would be disproportionate to the value of the procurement and that this was the reason to allow the procuring entity not to publish internationally.

101. Concern was expressed about the proposed changes. It was recalled that international and regional regulations usually referred to a certain threshold value below which the procurement was considered to be of no interest to international suppliers or contractors.

102. The Commission discussed whether to delete the reference to "low" in the provision to avoid confusion with other provisions of the Model Law that referred to a low value threshold but agreed to retain the current wording, noting that the provision would be explained in the Guide.

Article 33, paragraph 6

103. A query was raised as to whether a reference to paragraph 4 (a) of article 29 should be added to the provision. The discussion of that issue in the Working Group was recalled, in particular that the intention of the Working Group had been to exclude references to simple urgency in order to avoid abusive use of competitive negotiations and single-source procurement. It was proposed that, to avoid confusion, the word "urgency" should be replaced with the phrase "catastrophic events".

104. After discussion, the Commission agreed to add a reference to paragraph 4 (a) of article 29 in the provision.

Chapter III. Open tendering

Article 36, paragraph (c)

105. It was suggested that the provision should begin with the wording "A summary of".

106. The Commission agreed that the provision should read as follows: "A summary of the criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, and of any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications, in conformity with article 9 of this Law."

Article 41, paragraph 2

107. The Commission agreed to replace paragraph 2 with the following wording: "All suppliers or contractors that have presented tenders, or their representatives, shall be permitted by the procuring entity to participate in the opening of tenders." It was the understanding that the Guide would explain that the participation could be physical or virtual, and that both were covered by the provision, consistent with the technologically neutral approach to revising the Model Law.

Article 42

108. As a consequence of introducing new article 15 bis (see para. 52 above), the Commission agreed to delete paragraph 1 of article 42, to renumber subsequent paragraphs and to amend cross-references in article 42, including by inserting a cross-reference to the new article in what would become paragraph 2 (b).

Chapter IV. Procedures for restricted tendering, request for quotations and request for proposals without negotiation

Article 46, paragraph 2 (b)

109. The Commission agreed that the provision should begin with the words "A detailed description".

Article 46, paragraph 4 (d), and article 48, paragraph 5 (d)

110. The Commission agreed to replace in those paragraphs and in similar instances throughout the Model Law the phrase "formulated or expressed" with the phrase "formulated and expressed".

Chapter V. Procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement

Article 47, paragraph 4 (b)

111. The Commission agreed that the provision should prohibit the procuring entity from modifying the subject matter of the procurement, drawing on the same prohibition found in paragraph 9 of article 48. It was agreed that the Guide would explain what would be considered to be a modification of the subject matter of the procurement.

112. Accordingly, the Commission agreed to revise the provision as follows:

> "(b) In revising the relevant terms and conditions of the procurement, the procuring entity may not modify the subject matter of the procurement but may refine aspects of the description of the subject matter of the procurement by:
>
> (i) Deleting or modifying any aspect of the technical or quality characteristics of the subject matter of the procurement initially provided and by adding any new characteristics that conform to the requirements of this Law;
>
> (ii) Deleting or modifying any criterion for examining or evaluating tenders initially provided, and by adding any new criterion that conforms to the requirements of this Law, to the extent only that the deletion, modification or addition is required as a result of changes made in the technical or quality characteristics of the subject matter of the procurement."

Article 47, paragraph 4 (e)

113. The Commission agreed to update the cross-reference to paragraph 4 (b) of article 42 in the light of the revisions agreed to be made in article 42 (see para. 108 above).

Chapter VI. Electronic reverse auctions

Articles 52 and 53, titles

114. The Commission agreed that the title of article 52 should read "Electronic reverse auction as a stand-alone method of procurement" and the title of article 53 should read "Electronic reverse auction as a phase preceding the award of the procurement contract".

Article 52, paragraph 1 (c)

115. A query was raised as regards the reference to the "contract form, if any, to be signed by the parties". Objection was expressed to deleting the reference in the provision and in other relevant provisions, which were considered essential for transparency reasons; references to the terms and conditions of the procurement contract were not considered sufficient.

116. The Commission agreed to retain the current wording, with the Guide clarifying that it was not contemplated that any contract was to be signed at the outset of procurement proceedings.

Article 52, paragraphs 1 (k) and 2

117. It was agreed that paragraph 1 (k) of article 52 should read: "[(k) If any limitation on the number of suppliers or contractors that can be registered for the auction is imposed in accordance with paragraph (2) of this article, the relevant maximum number and the criteria and procedure, in conformity with paragraph (2) of this article, that will be followed in selecting it;]".

118. It was agreed that the following words should be added at the end of the first sentence of paragraph 2 of article 52: "and shall select the suppliers or contractors to be so registered in a non-discriminatory manner."

Article 52, footnote

119. It was proposed that paragraph 2 should be accompanied by the same footnote that accompanied paragraph 1 (k). The alternative view was that the footnote should be deleted on the understanding that all provisions of the Model Law were optional for enactment by States. Support was expressed for the latter proposal, as well as for the deletion of other footnotes in the text of the Model Law.

120. The view was expressed that, if the footnote were to be deleted, the provisions of paragraphs 1 (k) and 2 should also be deleted and perhaps placed in the Guide.

121. The Commission decided to retain the text of both paragraphs 1 (k) and 2 in brackets without any accompanying footnotes, but to include an explanation in the Guide of why the provisions appeared in brackets.

122. A general objection was raised to that approach, as well as to putting any text in the Model Law in square brackets or parentheses, except in cases where provisions called for enacting States to insert missing information, such as the name of a competent body. It was pointed out that the explanation in the Guide as regards the enactment of provisions of the Model Law should be sufficient. The alternative view was that it was common to use parentheses, square brackets and footnotes, when required, in UNCITRAL model laws. The Commission deferred its decision as

regards the use of parentheses and square brackets in the text to a later stage. (For further consideration of those issues, see paras. 175-178 below.)

Article 53, new paragraph 3

123. The Commission agreed to add the following new paragraph 3: "Where an evaluation of initial bids has taken place, each invitation to the auction shall also be accompanied by the outcome of the evaluation as relevant to the supplier or contractor to which the invitation is addressed."

Chapter VII. Framework agreements procedures

Article 57

124. A query was raised as regards the absence of a reference in article 57 to a declaration pursuant to article 8, given that such reference appeared in article 59. It was clarified that, in the context of closed framework agreements, the requirement to include such a reference could already be found in provisions regulating the procurement methods by means of which the closed framework agreement was to be awarded.

125. The Commission agreed that paragraph 2 should start with the following wording: "The provisions of this Law regulating pre-qualification and the contents of ...".

Article 58, paragraph 1, new subparagraph (f)

126. The Commission agreed to add the following subparagraph (f). "The manner in which the procurement contract will be awarded."

Article 59

127. The Commission recalled its decision as regards the footnote and the provisions to which it related in article 52 (see para. 121 above) and confirmed that that decision would also apply to the footnote and the provisions to which it related in article 59.

128. The Commission agreed to revise paragraph 2 as follows: "The procuring entity shall solicit participation in the open framework agreement by causing an invitation to become a party to the open framework agreement to be published following the requirements of article 32 of this Law"; to delete paragraph 3 (c), its provisions being superfluous in the light of paragraph 3 (b), with consequent renumbering of the remaining subparagraphs under paragraph 3 of that article; to replace the phrase in paragraph 3 (e) (ii) "in conformity with this Law" with the phrase "in conformity with paragraph 7 of this article"; and to add the following phrase in the end of the first sentence of paragraph 7: "and shall select the suppliers or contractors to be parties to the open framework agreement in a non-discriminatory manner."

Article 61, paragraph 4 (a)

129. It was proposed that the phrase "or only to each of those parties of the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement" should be deleted. It was explained that the

provision might otherwise lead to misuse, as unlimited discretion was given to the procuring entity to decide which suppliers or contractors parties to the framework agreement were capable of delivering the subject matter of the procurement. The point was made that in non-electronic framework agreements there would not be such a large number of suppliers or contractors parties to the framework agreement that it would become burdensome for the procuring entity to notify all such suppliers or contractors of procurement opportunities and that, in the context of framework agreements maintained electronically, which might have many suppliers parties, electronic means of communication would allow notifying all of them without significant cost and time.

130. The alternative view was that in some jurisdictions suppliers or contractors parties to the framework agreement were required to participate in the competition if they received an invitation from the procuring entity to do so. Reference was also made to the practical use of framework agreements by central purchasing agencies, which might face high costs if required to invite numerous suppliers parties to the framework agreement and to deal with large numbers of submissions from those that were not capable of meeting the procuring entity's needs. It was further explained that, if some suppliers or contractors parties to the framework agreement indicated to the procuring entity from the outset of the procurement proceedings their limited capacity to deliver certain parts of the subject matter of the procurement, it would be inappropriate for the procuring entity to invite them. The point was made that safeguards against abuse should therefore be balanced against the considerations of efficiency and practicality. The Commission deferred its consideration of the issue to a later stage.

131. After subsequent discussion, the following proposal was made for a new subparagraph (a):

> "(a) The procuring entity shall issue a written invitation to present submissions simultaneously:
>
> (i) To each supplier or contractor party to the framework agreement; or
>
> (ii) Only to each of those parties of the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement, provided that, at the same time, notice of the second-stage competition is given to all parties to the framework agreement so that they have the opportunity to participate in the second-stage competition;".

132. The view was expressed that subparagraph (ii) was unnecessary, and that only the provisions of the chapeau and subparagraph (i) should be included. In support of that view, it was emphasized that otherwise the provisions would open the door to corruption by giving the procuring entity unlimited discretion in the selection of capable suppliers or contractors.

133. The view prevailed that the wording as proposed in paragraph 131 above achieved the desired compromise by addressing both transparency and efficiency and should therefore be included as a new subparagraph (a).

134. It was agreed that the Guide would note that, in order to prevent the procuring entity from being confronted by a large number of challenges related to its assessment of suppliers' or contractors' capability to supply, the framework

agreement ought to set out clear procedures and criteria that would enable the procuring entity to identify which suppliers or contractors were capable.

135. It was agreed that the means of fulfilling the notice requirement would be explained in the Guide, highlighting various considerations, such as costs and the availability of electronic means of communication, and that the nature of the notice might vary as communication methods improved over time.

Article 62, title

136. It was proposed that the title of the article should read: "[Possible] Changes during the operation of the framework agreement". The alternative view was that the title should retain the notion that no material change, in particular to the subject matter of the procurement, should occur during the operation of a framework agreement. The point was made that the title should reflect the content of the article, which did not refer to material change. The discussion of "material change" in the Working Group was recalled, in particular that it had been decided at that time to avoid any reference to such a concept in the Model Law, as it was not easy to define. The alternative view was that "material change" should be understood as any change that would affect the group of competitors that would be interested in participating in any given procurement proceeding, and that this should be consistently understood in the implementation of the Model Law. The Commission deferred its consideration of the title of the article to a later stage.

137. After subsequent discussion, the Commission agreed that the title should read as follows: "Changes during the operation of a framework agreement".

Chapter VIII. Challenges and appeals

Title

138. The Commission agreed that the title of the chapter should be: "Challenge proceedings".

Terminology

139. It was agreed that the use of terminology should be streamlined throughout the chapter. In particular, the term "reconsideration" should be used in the context of the consideration of complaints by the procuring entity under article 65; the term "review" should be used in the context of the consideration of complaints by the independent body under article 66; and the term "appeal" should be used only in the context of judicial review.

140. It was also pointed out that, to the extent possible, consistency in the references to the group of persons to be notified of the decisions or actions under chapter VIII was desirable. The consideration and decisions of the Working Group as regards different groups of persons to be notified depending on decisions and actions in question were recalled.

Article 63

141. Strong opposition was expressed to retaining the provisions of article 63 as drafted. Concern was expressed that the article did not provide a clear idea to aggrieved suppliers or contractors as regards their options to challenge and seek

appeal and did not describe the sequence of steps that they could take. It was also observed that the article reflected a parallel system of review, while many jurisdictions followed a hierarchical system of review. It was considered doubtful that, in jurisdictions that would choose to invest in the establishment of an independent administrative body, suppliers or contractors would be allowed to seek recourse, as a general rule rather than as an exception, directly to the courts (i.e. bypassing the administrative body). It was therefore suggested that either the article should be redrafted to provide for several options, without preference being given to any one specific option, that could be considered by the enacting State, or that the article should be deleted altogether. In the latter case, it was suggested, text in square brackets could be inserted in its place inviting enacting States to consider which challenge and appeal system should be put in place in their jurisdiction, considering in particular whether an administrative body existed in their jurisdiction and the efficacy of their court system.

142. In response, doubts were expressed that the Model Law could set out all potential scenarios that might exist in challenge and appeal proceedings under chapter VIII of the draft. It was considered more appropriate to retain the text of article 63 as drafted and to describe all possible scenarios in the Guide. It was observed that the chapter reflected the consensus reached in the Working Group. Support was also expressed for the current approach in drafting chapter VIII, as it ensured, in the view of some delegations, the effectiveness of the review system. Concerns were expressed that requiring remedies to be exhausted in one body before going to the other might lead to negative consequences for both the procuring entity and suppliers or contractors: from the point of view of suppliers or contractors, they might be forced to deal with less efficient or more corrupt bodies before being able to have resort to the most effective body, and that could nullify the effectiveness of the review system; from the point of view of the procuring entity, requiring suppliers or contractors to take steps in sequence might lead to longer suspension periods and bring additional costs to the procurement process.

143. Others urged flexibility as long as the chapter reflected the minimum standards of the challenge and appeal system found in applicable international instruments, such as the United Nations Convention against Corruption[7] and the 1994 WTO Agreement on Government Procurement. It was recalled that the view had been clearly expressed at an earlier session of the Commission that it was not within the scope of the Model Law to dictate to enacting States which review system they should follow. A preference was therefore expressed for leaving all options open for consideration by enacting States.

144. In subsequent discussion, the suggestion was made to split paragraph 1 into two parts: the first dealing with the requirements that suppliers or contractors ought to meet to be able to bring challenges or appeals (that part would continue to reflect in essence article 52 of the 1994 text); and the second dealing with the organization of a challenge and appeal system in an enacting State, including whether it should be parallel or hierarchical. As regards the latter, it was suggested that footnotes 7 and 14 in the current draft could accompany the resulting second part. The need for retaining the second part in the Model Law was questioned. The suggestion was

[7] United Nations, *Treaty Series*, vol. 2349, No. 42146.

made to reflect its content in a footnote that would accompany article 63 or be placed in the Guide.

145. In further discussion, it was proposed that the text in paragraph 1 ending with the words "action concerned" should be retained in the Model Law, together with paragraph 2, while the remaining provisions of the article would be deleted. It was understood that the Guide would explain the options available to enacting States, including as regards hierarchical applications and sequencing.

146. After subsequent discussion, the Commission agreed that the title of the article should be "Right to challenge and appeal" and that the article should read as follows:

> "1. A supplier or contractor that claims to have suffered or claims that it may suffer loss or injury because of alleged non-compliance of a decision or action of the procuring entity with the provisions of this Law may challenge the decision or action concerned.
>
> 2. Challenge proceedings may be made by way of [an application for reconsideration to the procuring entity under article 65 of this Law, an application for review to the [*name of the independent body*] under article 66 of this Law or an appeal to the [*name of the court or courts*].]"

147. In subsequent discussion, it was agreed that paragraph 2 of article 63 as proposed in paragraph 146 above should also contain a reference to applications to courts so as to allow a first-instance review by the courts of decisions or actions taken by the procuring entity in the procurement proceedings.

148. It was agreed that the Guide should include provisions along the following lines, subject to clarification of the terminology: "The enacting State may add provisions addressing the sequence of applications, if desired, and to allow an independent body or court to hear an appeal from an application for review; the application for reconsideration can be followed by an application for review or for judicial review, according to the domestic enactment of the Model Law."

149. The point was made that, if paragraph 2 as contained in document A/CN.9/729/Add.8 were to be deleted, article 69 should remain in the text. (For further consideration of that point and the Commission's decision to add a new paragraph 3 to article 63, see paras. 171-174 below.)

Article 64, paragraph 1, and article 65, paragraph 3

150. Concerns were raised about the impact of the above provisions on the entry into force of the procurement contract, in particular that they might involve lengthy delays to the procurement at issue. The consideration in the Working Group of policy issues underlying the drafting of chapter VIII was recalled.

151. A query was raised as regards a particular step or steps intended to be covered by the term "enter into a procurement contract" in paragraph 1 of article 64, whether the intention was to cover only the dispatch of the notice of acceptance of the successful submission or to cover also the request or receipt of approval from a competent body and the signature of the procurement contract. It was proposed that the drafting of paragraph 1 of article should be clarified in that respect, for example by stating that the "procuring entity shall not take any action to bring the contract

into force", to encompass all actions leading to the entry into force of the procurement contract under article 21 of the draft. The Commission deferred its decision on the final wording of those provisions to a later stage. (For the decision on the final wording of article 64, see para. 152 below.)

Article 64

152. The Commission agreed that the title of the article should be: "Effect of a challenge" and that paragraphs 1 and 2 of the article should read as follows:

> "1. The procuring entity shall not take any step that would bring a procurement contract or framework agreement in the procurement proceedings concerned into force:
>
> (a) Where it receives an application for reconsideration within the time-limits specified in article 65 (2); or
>
> (b) Where it receives notice of an application for review from the [*name of the independent body*] under article 66 (5)(b); or
>
> (c) Where it receives notice of an application or of an appeal from the [*name of the court or courts*].
>
> 2. The prohibition referred to in paragraph (1) shall lapse ... working days (*the enacting State specifies the period*) after the decision of the procuring entity, the [*name of the independent body*] or the [*name of the court or courts*] has been communicated to the applicant or appellant, as the case may be, to the procuring entity, where applicable, and to all other participants in the challenge proceedings."

153. It was agreed that the Guide would explain the term "participants in the challenge proceedings" and would note that enacting States might choose to use another term to refer to the entities that would have the requisite interest to take part in the proceedings.

154. The Commission agreed to delete the words "or appeal" and "or appellant, as the case may be" in paragraph 3 (b) of the article.

Article 65, paragraphs 4 and 7

155. It was agreed that the following provisions should appear in square brackets in both paragraphs as follows: "[in the [*name of the independent body*] under article 66 of this Law or in the [*name of the court or courts*]]".

Article 66

156. It was agreed that:

(a) Reference to "appeal(s)" and "appellant, as the case may be" should be deleted in the title and throughout the article;

(b) Paragraph 1 should read: "A supplier or contractor may apply to the [*name of the independent body*] for review of a decision or an action taken by the procuring entity in the procurement proceedings, or of the failure of the procuring entity to take a decision under article 65 of this Law within the time limits prescribed in that article"; and

(c) The following words should be deleted in paragraph 2 (d): "Appeals against decisions of the procuring entity taken under article 65 of this Law, or" and that the word "appellant" would be replaced with the word "applicant".

157. It was suggested that paragraphs 4 and 5 were excessively detailed and that some provisions therein could be deleted. The need to retain the provisions addressing "urgent public interest considerations" was emphasized, however.

158. The Commission agreed to retain paragraphs 4 and 5 with the following wording added at the end of paragraph 5 (a): "in accordance with paragraphs (3) and (4) of this article."

159. The proposal was made to redraft paragraph 8, which currently implied a physical transfer by the procuring entity of the relevant documents to the independent body. It was explained that it might not be possible to implement such an obligation where classified information was concerned or when a large volume of information was involved. It was therefore proposed that the provision should read: "The procuring entity shall provide the [*name of the independent body*] with all documents or grant access to all documents related to the procurement."

160. The opposing view was that the proposed changes might put the independent body in a disadvantaged and inappropriate position since they implied that the independent body would be required physically to visit the procuring entity's premises and to request access to the documents. According to that view, the provisions in the draft were considered appropriate. A further view was that the provisions might be redrafted in broader terms to refer, for example, to the obligation of the procuring entity to provide documents to the independent body in a manner that ensured effective access by the independent body to all documents.

161. It was suggested that the drafting of the opening phrase in English could be clarified to make it clear that reference was being made to the appeal by the supplier or contractor, not the independent body.

162. The Commission deferred its decision on the wording of paragraph 8 to a later stage.

163. After subsequent discussion, it was agreed that paragraph 8 should read as follows: "Promptly upon receipt of a notice under paragraph (5) (b) of this article, the procuring entity shall provide the [*name of the independent body*] with effective access to all documents relating to the procurement proceedings in its possession, in a manner appropriate to the circumstances." It was agreed that the Guide should explain how access (physical or virtual) to documents could be granted in practice and that the relevant documents could be provided in steps. (For example, a list of all documents could be provided to the independent body first so that the independent body could identify those documents relevant to the proceedings before it.)

164. Concerns were raised as regards the use of the adjectives "lawful" and "unlawful" in paragraph 9. The use of alternative qualifying terms, such as "in violation of law" or "deemed/found/decided to be unlawful/lawful", was proposed. The Commission deferred its decision on the wording to a later stage.

165. After subsequent discussion, it was agreed that subparagraphs (a) to (e) and (h) of paragraph 9 should read:

"(a) Prohibit the procuring entity from acting, taking a decision or following a procedure that is not in compliance with the provisions of this Law;

(b) Require the procuring entity that has acted or proceeded in a manner that is not in compliance with the provisions of this Law, to act, take a decision or to proceed in a manner that is in compliance with the provisions of this Law;

[(c) Overturn in whole or in part an act or a decision of the procuring entity that is not in compliance with the provisions of this Law [other than any act or decision bringing the procurement contract or the framework agreement into force];

(d) Revise a decision by the procuring entity that is not in compliance with the provisions of this Law [other than any act or decision bringing the procurement contract or the framework agreement into force];

(d bis) Confirm a decision of the procuring entity;

(e) Overturn the award of a procurement contract or a framework agreement that has entered into force in a manner that is not in compliance with the provisions of this Law and, if notice of the award of the procurement contract or the framework agreement has been published, order the publication of notice of the overturning of the award;]

...

(h) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting an application as a result of an act or decision of, or procedure followed by, the procuring entity in the procurement proceedings, which is not in compliance with the provisions of this Law, and for any loss or damages suffered[, which shall be limited to costs for the preparation of the submission, or the costs relating to the application, or both]; or "

166. It was agreed that in paragraph 10 the words "challenge or appeal proceedings" should be replaced with the words "application for review".

Article 67

167. The Commission agreed to delete references to "appeal" in the title and throughout the article and to delete in paragraph 3 the words "relevant challenge or appeal". It also agreed to add the words "duly notified of the proceedings" after the words "a supplier or contractor" at the beginning of the second sentence of paragraph 1.

168. A query was raised as regards the reference to "any governmental authority" in the text. The understanding was that this reference would be explained in the Guide.

Article 68

169. It was proposed to reflect in the article that restricted access to classified information might be possible. The understanding was that no changes to that end in the article were needed.

170. The Commission agreed to delete references to "appeal" in the title and in the article.

Article 69 and consequent changes in article 63 (addition of a new paragraph 3)

171. A query was raised as to whether article 69 was needed. The broadly held view was that retaining a reference to judicial review in chapter VIII, either in article 69 or by expanding article 63, was essential. The Commission deferred its decision on that issue to a later stage.

172. In further discussion, the view was expressed that article 69 should be deleted. The deletion of that article was supported on the condition that additional wording would be included in article 63, as a new paragraph 3, reflecting the need under international instruments for an enacting State to have a two-stage appeal system. Such additional wording, it was said, would draw on paragraph 2 of draft article 63 in document A/CN.9/729/Add.8 and could read: "A supplier or contractor may appeal any decision taken in challenge proceedings in [*name of the court or courts*]."

173. Concern was expressed about the proposed wording since it implied requirements for appeals against court judgements, which were considered to be outside the scope of the Model Law.

174. After discussion, it was agreed that article 69 would be deleted and a new paragraph 3 would be included in article 63 that would read: "A supplier or contractor may appeal any decision taken in challenge proceedings under article 65 or 66 of this Law in [*name of the court or courts*]."

Footnotes, the use of parentheses and square brackets

175. The view was expressed that some footnotes in chapter VIII should be deleted. The Commission recalled its earlier considerations as regards the desirability of including any footnotes in the Model Law (see paras. 119-122 above) and decided to defer its consideration of the issue as a whole to a later stage of the session.

176. After subsequent discussion, it was agreed that all footnotes currently in chapter VIII should be removed, that their contents should be reflected in the Guide and that a new footnote to the title to the chapter would be inserted to direct enacting States to consider the various options for the text that were explained in the Guide.

177. It was agreed that all other footnotes in the draft revised text of the Model Law, other than those expressly agreed to be deleted during the current session of the Commission, were to be retained in the text of the Model Law.

178. It was also agreed that parentheses were to be used when necessary for grammatical reasons, while square brackets were to be used where it was necessary to signal to enacting States that the text was optional. In the latter case, it was pointed out, the square brackets were intended to draw the attention of States to the

particular considerations discussed in the Guide that might affect their decisions on how to enact the text.

Finalization of the Model Law

179. The Commission authorized the Secretariat to prepare the final text of the Model Law by incorporating changes agreed to be made at the session to document A/CN.9/729 and its addenda, renumbering the articles as a result of the introduction of new article 15 bis, amending cross-references and making other necessary editorial changes throughout the Model Law.

General comments

180. While acknowledging the efforts made to prepare the revised Model Law, a view was expressed that some of its provisions focused excessively on the use of public procurement as a tool for promotion of international trade. According to that view, public procurement in many developing countries was used as a tool for building local capacities, developing local small and medium-sized enterprises and implementing other socio-economic and environmental policies of States. The Commission was urged to take into account the social and economic realities of various countries in preparing the Guide and to avoid indicating that the text should be directly implemented into domestic legislation without amendment to take account of such matters.

C. Preparation of a Guide to Enactment to the revised Model Law

181. The importance of a Guide to Enactment to the revised Model Law as an indispensable accompaniment to that Model Law was stressed. Recalling that the Guide was expected to contain recommendations to enacting States on how to implement the Model Law, it was understood that the Guide should be approved by the Commission at its next session. It was therefore agreed that work on finalizing the Guide should be undertaken in as efficient and practical manner as possible. Views varied, however, on whether the Working Group should reconvene to finalize the Guide. The view of some delegations was that this was not necessary; the core policy issues had been agreed and reflected in the Model Law, so the Secretariat, in consultation with experts, would be able to finalize the Guide. In support of that view, it was stated that: (a) the final Guide should be presented by the Secretariat for adoption of the Commission at its forty-fifth session, in 2012; (b) a sufficient number of days should be allocated to the Commission for that purpose; and (c) if any session of the Working Group were to be held before the Commission's forty-fifth session, only one session, preferably in the spring of 2012, should be held. Another view was that, in the light of budgetary uncertainties, a Working Group session before the Commission's session in 2012 would be undesirable. Alternatives to Working Group sessions were considered, such as meetings of a working party, informal meetings before the Commission session or expert group meetings in the manner usually convened by the Secretariat.

182. The alternative view was that it was essential for the Working Group to continue working on the Guide, particularly as a number of policy issues (some of which might be difficult to resolve) had been referred to the Guide for elaboration.

The involvement of all delegations in resolving them was considered important. Support was therefore expressed for holding at least one session of the Working Group before the next session of the Commission. It was added that the draft Guide was a long document, which the Commission would not be in a position during its session to consider in sufficient detail in full in order to ensure the quality of the text.

183. The differences between formal intergovernmental sessions and informal expert group meetings convened by the Secretariat, from budgetary and other perspectives, were recalled. Informal alternatives to a session of the Working Group alone were not considered viable, in part because the expectation was that the Guide would be finalized in a formal intergovernmental setting. It was emphasized that experts at expert group meetings acted in their individual capacity rather than as representatives of Governments; since the Guide was expected to be an UNCITRAL document, it was considered essential that all States had a chance to participate. In addition, concerns were expressed that availability of resources for interpretation and translation in all six official United Nations languages in the context of informal meetings, unlike formal intergovernmental sessions, could not be ensured. It was considered essential that the text of the Guide should be made available in all official languages of the United Nations well before the session of the Commission for comment by States and interested organizations.

184. The Commission preliminarily agreed that holding one session of the Working Group before the next session of the Commission, in either late autumn 2011 or early 2012, would be appropriate; the final decision on that issue was deferred, however, until the Commission had a chance to consider all issues related to future meetings of UNCITRAL. (For further consideration of the issue, see paras. 334-350 below.) The Secretariat was instructed to advance work on the Guide as much as possible for that session of the Working Group, through informal consultations with experts. The prevailing view was that, during the preparation of the revised Model Law, in-person expert group meetings had proved to be more efficient than teleconferences or exchanges of comments and documents.

185. It was proposed that the Commission should consider at a later session whether some topics addressed in the Guide (such as defence procurement) and other issues that might be of interest to users or in certain regions could be discussed in detail in supporting papers, rather than in the Guide.

186. In response to a query on how to ensure that the Guide would be a living document, the suggestion was made that it could be updated electronically on the UNCITRAL website. The need for regular contacts by the Secretariat with experts to monitor developments in the regulation of public procurement was emphasized. It was suggested that the Commission might receive periodic reports of the Secretariat with the relevant information and proposals and that it would be for the Commission to authorize making the proposed changes in the Guide. The significant expertise that had been built up in the preparation of the revised Model Law and a revised Guide could be harnessed through such a mechanism without the need to engage a working group.

187. The creation of a blog on the "UNCITRAL Model Procurement Law", and the principles of operation of that blog, were announced. The goal was to create an open

platform for the exchange of comments on the implementation of the revised Model Law and the use of its Guide.

D. Promotion of the revised Model Law

188. The Commission heard an oral report from the Secretariat on its efforts to promote the work of UNCITRAL in the area of public procurement and the instruments resulting from that work. It was reported that the main activities were through conferences and publications and technical assistance projects. A joint project with the European Bank for Reconstruction and Development and OSCE for countries of the Commonwealth of Independent States and Mongolia that was intended to start in September 2011 was cited as an example. The project, it was explained, had as its goal the promotion and use of the revised Model Law in those countries, some of which had based their procurement law on the 1994 text.

189. The need for States to take a more active role in promoting the use of the revised Model Law and its effective implementation and uniform interpretation, in particular through the donor agencies of States, was stressed, also given resource constraints in the Secretariat for such work. In that regard, reference was made to the CLOUT (case law on UNCITRAL texts) system for collecting and disseminating information about UNCITRAL texts (see paras. 271-274 below), which did not currently contain reported case law on UNCITRAL texts in the area of public procurement. Information about enactment of UNCITRAL instruments in that area was also lacking as a result of the absence of reports from States to the Commission. Inherent differences with respect to monitoring the enactment of UNCITRAL texts in the area of public procurement, including because enactments were generally adapted to suit local circumstances, were recalled. It was generally agreed that coordination among the various procurement reform agencies and other mechanisms to promote effective implementation and uniform interpretation of the revised Model Law should be considered. The benefits of those approaches for achieving a greater harmonization of public procurement laws in various jurisdictions were highlighted.

E. Future work in the area of public procurement

190. The Commission considered the desirability of work in the area of public-private partnerships and privately financed infrastructure projects. The Commission recalled its instruments on privately financed infrastructure projects and heard a view that those instruments might need to be updated in the light of the work accomplished in the area of public procurement. In the view of some delegations, however, the issue should be considered in the broader context of the future work programme of UNCITRAL as a whole and in the light of financial and human resource constraints faced by UNCITRAL and its secretariat so as to prioritize the work in various fields appropriately.

191. The Commission requested the Secretariat to prepare a study on possible future work of UNCITRAL in the area of public-private partnerships and privately financed infrastructure projects for consideration by the Commission at a future

session. It was noted that this topic could include many aspects, of which public procurement was only one.

F. Adoption of the UNCITRAL Model Law on Public Procurement

192. The Commission, after consideration of the text of the draft UNCITRAL Model Law on Public Procurement and other procurement-related topics, adopted the following decision at its 933rd meeting, on 1 July 2011:

"*The United Nations Commission on International Trade Law*,

"*Recalling* its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, and in particular those of developing countries, in the extensive development of international trade,

"*Noting* that procurement constitutes a significant portion of public expenditure in most States,

"*Recalling* the adoption of its Model Law on Procurement of Goods, Construction and Services at its twenty-seventh session, in 1994,[8]

"*Observing* that the 1994 Model Law, which has become an important international benchmark in procurement law reform, contains procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process,

"*Observing also* that, despite the widely recognized value of the 1994 Model Law, new issues and practices have arisen since its adoption that have justified revision of the text,

"*Recalling* that, at its thirty-seventh session, in 2004, it agreed that the 1994 Model Law would benefit from being updated to reflect new practices, in particular those resulting from the use of electronic communications in public procurement, and the experience gained in the use of the 1994 Model Law as a basis for law reform, taking care, however, not to depart from the basic principles behind it and not to modify the provisions whose usefulness had been proven,[9]

"*Recalling also* that at that session it decided to entrust the drafting of proposals for the revision of the 1994 Model Law to its Working Group I (Procurement), which was given a flexible mandate to identify the issues to be addressed in its considerations,[10]

"*Expressing appreciation* to the Working Group for having prepared the draft UNCITRAL Model Law on Public Procurement,

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[8] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), para. 97.

[9] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 81.

[10] Ibid., para. 82.

"*Noting* that the revisions to the 1994 Model Law were the subject of due deliberation and extensive consultations with Governments and interested international organizations, and thus it can be expected that the revised Model Law, to be called 'the UNCITRAL Model Law on Public Procurement', would be acceptable to States with different legal, social and economic systems,

"*Noting also* that the revised Model Law is expected to contribute significantly to the establishment of a harmonized and modern legal framework for public procurement that promotes economy, efficiency and competition in procurement and at the same time fosters integrity, confidence, fairness and transparency in the procurement process,

"*Being convinced* that the revised Model Law will significantly assist all States, in particular developing countries and States whose economies are in transition, in enhancing their existing procurement laws and formulating procurement laws where none presently exist, and will lead to the development of harmonious international economic relations and increased economic development,

"1. *Adopts* the UNCITRAL Model Law on Public Procurement as it appears in annex I to the report of its current session;

"2. *Requests* the Secretary-General to disseminate broadly, including through electronic means, the text of the UNCITRAL Model Law on Public Procurement to Governments and other interested bodies;

"3. *Recommends* that all States use the UNCITRAL Model Law on Public Procurement in assessing their public procurement legal regime and give favourable consideration to the UNCITRAL Model Law on Public Procurement when they enact or revise their laws;

"4. *Requests* all States to support the promotion and implementation of the UNCITRAL Model Law on Public Procurement;

"5. *Calls for* closer cooperation and coordination among the Commission and other international organs and organizations, including regional organizations, active in the field of procurement law reform, in order to avoid undesirable duplication of efforts and inconsistent, incoherent or conflicting results in the modernization and harmonization of public procurement law;

"6. *Endorses* the efforts and initiatives of the Commission's secretariat aimed at increasing coordination of, and cooperation on, legal activities concerned with public procurement reform."

IV. Finalization and adoption of judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency

193. The Commission noted that Working Group V (Insolvency Law) had considered at its thirty-ninth session, held in Vienna from 6 to 10 December 2010, a draft text of the judicial materials on the Model Law (A/CN.9/WG.V/WP.97 and Add.1 and 2), which responded to a mandate given to the Secretariat by the Commission and was developed in consultation with judges and insolvency experts

(A/CN.9/715, paras. 110-116). The Commission further noted that the draft text had been considered at the Ninth Multinational Judicial Colloquium, held in Singapore on 12 and 13 March 2011 (see paras. 220-221 below)[11] and that, pursuant to the Working Group's request (A/CN.9/715, para. 116), it had been circulated to Governments for comment in February 2011.

194. The draft judicial materials were revised on the basis of the decisions made by the Working Group at its thirty-ninth session, the comments received from Governments and those made at the judicial colloquium.

195. The Commission had before it the revised version of the draft judicial materials (A/CN.9/732 and Add.1-3), the comments from Governments (A/CN.9/733 and Add.1) and the report of the thirty-ninth session of the Working Group (A/CN.9/715). The Commission heard an oral introduction to the draft text.

196. The Commission expressed its appreciation for the draft judicial materials and emphasized their usefulness for practitioners and judges, as well as creditors and other stakeholders in insolvency proceedings, particularly in the context of the current financial crisis. In that regard, the judicial materials were viewed as very timely. The Commission also expressed its appreciation for the incorporation of the suggestions made by Governments following circulation of the draft judicial materials and agreed that the document should be entitled "The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective".

197. The Commission also agreed that, in order to recognize the significant contribution of Justice Paul Heath of the High Court of New Zealand in preparing the first draft of the judicial materials and contributing to its further development, an appropriate acknowledgement should be included in a preface that would be prepared by the Secretariat.

198. At its 934th meeting, on 1 July 2011, the Commission adopted the following decision:

The United Nations Commission on International Trade Law,

Noting that increased trade and investment leads to a greater incidence of cases where business is conducted on a global basis and enterprises and individuals have assets and interests in more than one State,

Noting also that, where the subjects of insolvency proceedings are debtors with assets in more than one State, there is generally an urgent need for cross-border cooperation in, and coordination of, the supervision and administration of the assets and affairs of those debtors,

Considering that cooperation and coordination in cross-border insolvency cases has the potential to significantly improve the chances for rescuing financially troubled debtors,

Believing that the UNCITRAL Model Law on Cross-Border Insolvency[12] (the Model Law) contributes significantly to the establishment of a

[11] The report of the colloquium is available from www.uncitral.org/pdf/english/news/NinthJC.pdf.

[12] United Nations publication, Sales No. E.99.V.3.

harmonized legal framework for addressing cross-border insolvency and facilitating coordination and cooperation,

Acknowledging that familiarity with cross-border cooperation and coordination and the means by which it might be implemented in practice is not widespread,

Convinced that providing readily accessible information on the interpretation of and current practice with respect to the Model Law for reference and use by judges in insolvency proceedings has the potential to promote wider use and understanding of the Model Law and facilitate cross-border judicial cooperation and coordination, avoiding unnecessary delay and costs,

1. *Adopts* the UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective, as contained in document A/CN.9/732 and Add.1-3 and authorizes the Secretariat to edit and finalize the text in the light of the deliberations of the Commission;

2. *Requests* the Secretariat to establish a mechanism for updating the Judicial Perspective on an ongoing basis in the same flexible manner as it was developed, ensuring that its neutral tone is maintained and that it continues to meet its stated purpose;

3. *Requests* the Secretary-General to publish, including electronically, the text of the Judicial Perspective, as updated/amended from time to time in accordance with paragraph 2 of this decision, and to transmit it to Governments with the request that the text be made available to relevant authorities so that it becomes widely known and available;

4. *Recommends* that the Judicial Perspective be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings;

5. *Also recommends* that all States continue to consider implementation of the Model Law.

V. Arbitration and conciliation

A. Progress reports of Working Group II

199. At its current session, the Commission had before it the reports of the Working Group on its fifty-third session, held in Vienna from 4 to 8 October 2010 (A/CN.9/712), and on its fifty-fourth session, held in New York from 7 to 11 February 2011 (A/CN.9/717). The Commission commended the Working Group for the progress made regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration and the Secretariat for the quality of the documentation prepared for the Working Group.

200. The Commission noted that the Working Group had considered matters of content, form and applicability of the legal standard on transparency to both future and existing investment treaties. It was confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the

mandate of the Working Group and a question with great practical interest, taking account of the high number of treaties already concluded. The Commission also reiterated its commitment expressed at its forty-first session, in 2008, regarding the importance of ensuring transparency in investor-State arbitration.[13]

201. The Commission noted that the Working Group had discussed at its fifty-third session the matter of submissions by third parties (amicus curiae) in arbitral proceedings. In that context, the question of intervention in the arbitration by a non-disputing State party to the investment treaty was raised. At that session, the Working Group had agreed to seek guidance from the Commission on whether that topic could be dealt with by the Working Group in the context of its current work (A/CN.9/712, para. 103). That agreement was reiterated by the Working Group at its fifty-fourth session (A/CN.9/717, para. 153). It was explained that, at its fifty-third session, the Working Group had noted that two possible types of amicus curiae should be distinguished and perhaps considered differently. The first type could be any third party that would have an interest in contributing to the solution of the dispute. A second type could be another State party to the investment treaty at issue that was not a party to the dispute. It was noted that such a State often had important information to provide, such as information on *travaux préparatoires*, thus preventing one-sided treaty interpretation. It was also noted that an intervention by a non-disputing State party of which the investor was a national could raise issues of diplomatic protection and was to be given careful consideration (A/CN.9/712, para. 49).

202. After discussion, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State party to the investment treaty should be regarded as falling within the mandate of the Working Group. Whether the legal standard on transparency should deal with such a right of intervention and, if so, the determination of the scope and modalities of such intervention should be left for further consideration by the Working Group.

203. With respect to future work in the field of settlement of commercial disputes, the Commission recalled that the issue of arbitrability should be maintained by the Working Group on its agenda, as decided by the Commission at its thirty-ninth session.[14] Further, the Commission heard a suggestion that the issue of confidentiality might need to be further examined. It was said that, where confidentiality was specifically protected under legislation, there was no single approach to the scope of the obligation of confidentiality in terms of the information that was to be treated as confidential, the persons to whom the obligation attached or permissible exceptions to prohibitions on disclosure and communication. The Commission agreed that the options for dealing with confidentiality in commercial arbitration should be considered as a matter for future work of the Working Group.

204. The Commission was informed that recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010,[15] were under preparation by the Secretariat in accordance with the decision of the Commission at its

[13] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314.

[14] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 187.

[15] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I.

forty-third session, in 2010.[16] It was recalled that the purpose of such recommendations was to promote the use of the Rules and that arbitral institutions in all parts of the world would be more inclined to accept acting as appointing authorities if they had the benefit of such recommendations. Subject to the availability of resources, the Secretariat was requested to prepare draft recommendations for consideration by the Commission at a future session, preferably as early as 2012.

205. The Commission agreed that the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings[17] needed to be updated pursuant to the adoption of the UNCITRAL Arbitration Rules, as revised in 2010, and entrusted the Secretariat with the preparation of the revised Notes.

206. The Commission heard an oral report on progress regarding the preparation of a guide to enactment and use of the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006.[18] The Commission requested the Secretariat to pursue its efforts towards the preparation of the guide. It was agreed that a more substantive presentation on progress made in the preparation of the guide should be made at a future session of the Commission.

207. Noting the various projects referred to in paragraphs 204-206 above, as well as the preparation of a guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (see paras. 250-252 below), the Commission discussed the priorities to be given to those projects. The Commission agreed on the importance of each of those projects and took note of the fact that, resources permitting, the Secretariat should work as a matter of priority on the preparation of recommendations on the use of the UNCITRAL Arbitration Rules, as revised in 2010, and on revising the UNCITRAL Notes on Organizing Arbitral Proceedings. The elaboration of a guide on the New York Convention (see para. 252 below), which might take longer than the other two projects, was seen as a particularly important goal.

B. Mediation in the context of settlement of investor-State disputes

208. The Commission noted that, following consultations between the secretariats of UNCITRAL and UNCTAD, a proposal had been received by the UNCITRAL secretariat from UNCTAD on the question of mediation in the context of settlement of investor-State disputes (transmitted to the Commission in a note by the Secretariat (A/CN.9/734)).

209. The Commission heard a presentation by the secretariat of UNCTAD on the use of mediation in the context of investor-State dispute settlement. The work of UNCTAD on international investment law was said to pursue the overall objective of harnessing foreign investment as a tool for sustainable development. It was said that, in recent years, there had been an increasing interest in the possibility of using

[16] Ibid., para. 189.

[17] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), part II.

[18] Ibid., *Fortieth Session, Supplement No. 17* (A/40/17), annex I; and ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex I. For previous discussions on the issue, see ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 176.

alternative methods for managing disputes effectively. Effective recourse to mediation or conciliation as part of investor-State dispute settlement mechanisms might improve the efficiency of dispute resolution and have several advantages, such as enhancing flexibility, consuming fewer resources and being favourable to the long-term working relationship between the parties, while simultaneously improving good governance and regulatory practices of States.[19] Overall, mediation/conciliation as an alternative approach to international arbitration under investment treaties was said to offer a promising alternative to the settlement of investment disputes through international arbitration; hence various actors should be encouraged to give such methods further consideration.

210. It was said that UNCITRAL had already adopted well-known texts in the field of mediation/conciliation. The 1980 UNCITRAL Conciliation Rules[20] contained a set of rules to be applied by agreement of the parties to conciliation of disputes arising out of, or relating to, a contractual or other legal relationship where the parties were seeking an amicable settlement of their dispute. The UNCITRAL Model Law on International Commercial Conciliation, adopted in 2002,[21] which provided uniform rules in respect of the conciliation process, used a broad notion of the term "conciliation" for referring to proceedings in which a third person or a panel of persons ("the conciliator") assisted the parties in their attempt to reach an amicable settlement of their dispute. The Model Law on Conciliation addressed procedural aspects of conciliation, including the appointment of conciliators, the commencement and termination of conciliation, the conduct of conciliation, communication between the conciliator and other parties, confidentiality and the admissibility of evidence in other proceedings, as well as post-conciliation issues, such as the conciliator acting as arbitrator and the enforceability of settlement agreements.

211. The Commission considered steps that might need to be taken to foster the use of mediation in the context of investor-State dispute settlement. It was suggested that the UNCITRAL and UNCTAD secretariats should combine forces to increase awareness among the community of States, investors, legal practitioners, and arbitration and international organizations about mediation/conciliation as an alternative approach to investor-State dispute resolution that would complement sustainable and responsible investment.

212. After discussion, the Commission expressed its appreciation to its secretariat for establishing close cooperation with UNCTAD over the previous years. The secretariat was encouraged to continue such cooperation, resources permitting. The Commission agreed that the proposal to foster the use of mediation in the context of investor-State dispute settlement was worthy of further consideration. It was suggested that conciliation/mediation with respect to the settlement of treaty-based investor-State disputes should be considered as a topic for future work by the Working Group.

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[19] *Investor-State Disputes: Prevention and Alternatives to Arbitration*, United Nations publication, Sales No. E.10.II.D.11; available from www.unctad.org/en/docs/diaeia200911_en.pdf.

[20] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 106.

[21] United Nations publication, Sales No. E.05.V.4.

VI. Online dispute resolution: progress reports of Working Group III

213. The Commission recalled its previous discussions of online dispute resolutions.[22] At its current session, the Commission noted that Working Group III (Online Dispute Resolution) had commenced its deliberations on the preparation of legal standards, in particular procedural rules on online dispute resolution for cross-border electronic transactions, at its twenty-second session, held in Vienna from 13 to 17 December 2010, and continued its work at its twenty-third session, held in New York from 23 to 27 May 2011. The Commission also noted that, in addition to the procedural rules, the Working Group had requested the Secretariat, subject to the availability of resources, to prepare documentation for its next session addressing the issues of guidelines for neutrals, guidelines for online dispute resolution providers, substantive legal principles for resolving disputes and a cross-border enforcement mechanism.

214. The Commission expressed its appreciation to the Working Group for the progress made, as reflected in the reports on its twenty-second (A/CN.9/716) and twenty-third sessions (A/CN.9/721) and commended the Secretariat for the working papers and reports prepared for those sessions.

215. The Commission took note of a concern raised that, given that online dispute resolution was a somewhat novel subject for UNCITRAL and that it related at least in part to transactions involving consumers, the Working Group should adopt a prudent approach in its deliberations, bearing in mind the Commission's direction at its forty-third session that the Working Group's work should be carefully designed not to affect the rights of consumers.[23]

216. The view was expressed that the Working Group should bear in mind the need to conduct its work in the most efficient manner, which included prioritizing its tasks and reporting back with a realistic time frame for their completion.

217. Differing views were expressed as to whether the mandate of the Working Group should be interpreted to include consumer-to-consumer transactions. One view was that such a further emphasis on the inclusion of consumer-related transactions might make it more difficult to reach consensus on the work of the Working Group as a whole. Another view was that, in practice, it was often difficult, if not impossible, to determine whether a party to a transaction was a consumer or a business.

218. After discussion, the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including business-to-business and business-to-consumer transactions. The Commission decided that, while the Working Group should be free to interpret that mandate as covering consumer-to-consumer transactions and to elaborate possible rules governing consumer-to-consumer relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation. The

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[22] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 338 and 341-343; and ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 252 and 257.

[23] Ibid. *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 256.

Commission also decided that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its next session.

VII. Insolvency law: progress report of Working Group V

A. Progress report of Working Group V

219. The Commission recalled its previous discussions on activity undertaken by Working Group V (Insolvency Law) on the following two topics: (a) guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests and possible development of a model law or provisions on insolvency law addressing selected international issues, such as jurisdictions, access and recognition, in a manner that would not preclude the development of a convention; and (b) responsibility and liability of directors and officers of an enterprise in insolvency and pre-insolvency cases.[24] The Commission expressed its appreciation for the progress made by the Working Group as reflected in the report of its thirty-ninth session, held in Vienna from 6 to 10 December 2010 (A/CN.9/715), and commended the Secretariat for the working papers and reports prepared for that session.

B. Ninth Multinational Judicial Colloquium

220. The Commission heard a brief report on the Ninth Multinational Judicial Colloquium, held in Singapore on 12 and 13 March 2011.[25] The colloquium, organized jointly by UNCITRAL, the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International) and the World Bank, was attended by approximately 80 judges from 44 States, who discussed issues of cross-border insolvency coordination and cooperation, including in the context of enterprise groups, as well as the draft text of the UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective, the preparation of which was widely supported by judges as a valuable source of information on current issues and practice. The colloquium was once again judged by participants to be a very useful event and a welcome opportunity for judges from different jurisdictions to meet and discuss cross-border insolvency-related issues and share their experiences. The Commission noted that a short report on the colloquium had been prepared and made available on the respective websites of the three organizations.

221. The Commission expressed its satisfaction to the Secretariat for organizing the colloquium and requested the Secretariat to continue cooperating actively with INSOL International and the World Bank, with a view to organizing further colloquiums in the future, resources permitting.

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[24] Ibid., para. 259.

[25] The report of the colloquium is available from www.uncitral.org/pdf/english/news/NinthJC.pdf.

C. World Bank: treatment of natural persons in insolvency

222. The Commission heard an oral presentation from the World Bank on work to be undertaken by its Insolvency and Creditor/Debtor Regimes Task Force to study key regulatory aspects underlying natural person insolvency, the variation in legal treatment under national legal regimes and the implications of those divergences for international collaboration and coordination. One of the lessons from the recent financial crisis, the World Bank advised, was the recognition of the problem of consumer insolvency as a systemic risk and the consequent need for the modernization of domestic laws and institutions to enable jurisdictions to deal effectively and efficiently with the risks of individual overindebtedness. The World Bank emphasized the importance of the participation of UNCITRAL in that work, particularly in the light of the possibility that it might lead to additions to the existing insolvency standard, comprising the recommendations of the UNCITRAL Legislative Guide on Insolvency Law[26] and the World Bank's Principles for Effective Insolvency and Creditor Rights Systems.[27] The Commission encouraged the Secretariat to participate actively in the work of the Task Force and to partner with the World Bank in any further work that might contribute to establishing best practice on that topic.

VIII. Security interests: progress reports of Working Group VI

223. The Commission recalled its previous discussions on the preparation of a text on the registration of security rights in movable assets.[28] At its current session, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its eighteenth session, held in Vienna from 8 to 12 November 2010, and nineteenth session, held in New York from 11 to 15 April 2011 (A/CN.9/714 and A/CN.9/719, respectively). The Commission noted that, at its eighteenth session, the Working Group had adopted the working assumption that the text it had been entrusted to prepare would take the form of a guide on the implementation of a registry of notices with respect to security rights in movable assets. In addition, the Commission noted that, at that session, the Working Group had generally agreed that the text could include principles, guidelines, commentary and possibly recommendations with respect to registration regulations. Moreover, the Commission noted that the Working Group had agreed that the text should be consistent with the UNCITRAL Legislative Guide on Secured Transactions,[29] at the same time taking into account the approaches taken in modern security rights registration systems, both national and international (A/CN.9/714, para. 13). The Commission also noted that, having agreed that the Secured Transactions Guide was consistent with the guiding principles of UNCITRAL texts on e-commerce, the Working Group considered certain issues arising from the use of electronic communications in security rights registries to ensure that, like the Secured

[26] United Nations publication, Sales No. E.05.V.10.

[27] Available from www.worldbank.org.

[28] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 265-268.

[29] United Nations publication, Sales No. E.09.V.12.

Transactions Guide, the text on registration would also be consistent with those principles (A/CN.9/714, paras. 34-47).

224. The Commission also noted that, at the nineteenth session of the Working Group, differing views had been expressed as to the form and content of the text to be prepared. One view noted was that the text should be a stand-alone guide that would include an educational part introducing the secured transactions law recommended in the Secured Transactions Guide and a practical part that would include model regulations and commentary thereon. Another view noted was that the text should place more emphasis on model regulations and commentary thereon, which should provide States that had enacted the secured transactions law recommended in the Secured Transactions Guide with practical advice as to the issues to be addressed in the context of the establishment and operation of a general security rights registry (A/CN.9/719, paras. 13-15). The Commission also noted that differing views had also been expressed at that session of the Working Group as to whether the regulations should be formulated as model regulations or as recommendations (A/CN.9/719, para. 46). The Commission further noted that, at its nineteenth session, the Working Group had completed the first reading of the draft Security Rights Registry Guide and draft Model Regulations (A/CN.9/WG.VI/WP.46 and Add.1-3) and had requested the Secretariat to prepare a revised version reflecting the deliberations and decisions of the Working Group (A/CN.9/719, para. 12).

225. The Commission expressed its appreciation to the Working Group for the significant progress achieved in its work and to the Secretariat for the efficient assistance provided to the Working Group. The significance of the work undertaken by Working Group VI was emphasized in particular in view of the efforts currently being undertaken by several States with a view to establishing a general security rights registry and the significant beneficial impact the operation of such a registry would have on the availability and cost of credit. With respect to the form and content of the text to be prepared, it was stated that, following the approach used with respect to the Secured Transactions Guide, the text should be formulated as a guide with commentary and recommendations rather than as a text with model regulations and commentary thereon. In that connection, it was noted that the next version of the text before the Working Group would be formulated in a way that would leave the matter open until the Working Group had made a decision. After discussion, the Commission agreed that, leaving aside the decision on the form and content of the text to be prepared for the Working Group, the mandate of the Working Group did not need to be modified and that, in any case, a final decision would be made by the Commission once the Working Group had completed its work and submitted the text to the Commission.

226. Noting the significant progress made by the Working Group in its work and the guidance urgently needed by a number of States, the Commission requested the Working Group to proceed with its work expeditiously and to try to complete its work, hopefully in time for the text to be submitted to the Commission for final approval and adoption at its forty-fifth session, in 2012.

227. As to the future work of the Working Group, it was generally agreed that it was premature for the Commission to consider the matter and make any decision at the current session. The Commission left it to the Working Group to discuss its possible future work and make proposals to the Commission. In that connection, the

suggestion was made that, after completing its text on registration, the Working Group should embark on a project aimed at converting the recommendations in the Secured Transactions Guide into a model law.

228. The Commission next turned to the question of whether a joint set of principles on effective secured transactions regimes should be prepared in cooperation with the World Bank on the basis of the recommendations of the Secured Transactions Guide. It was noted that, based on the precedent of the coordination between the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes and the UNCITRAL Legislative Guide on Insolvency Law, a draft of those principles could be prepared by the Secretariat in cooperation with the World Bank, through its Legal Vice-Presidency, and outside experts, within existing resources and without utilizing Working Group resources. The Commission welcomed the preparation of such principles. It was widely felt that, as the Secured Transactions Guide became the general reference material in secured transactions law reform efforts, principles reflecting the recommendations of the Secured Transactions Guide would promote law reform based on generally acceptable international standards. After discussion, the Commission requested the Secretariat to proceed with the preparation, in cooperation with the World Bank and outside experts, of a joint set of principles on effective secured transactions regimes. It was agreed that such efforts would be aimed at preparing a text that would be approved by both the Commission and the World Bank and could include consultations and meetings with experts from the public and private sector, within existing resources.

229. The Commission next considered the question of whether efforts should be undertaken with a view to ensuring consistency between a proposed European Union instrument on the law applicable to the third-party effects of assignments of receivables and the United Nations Convention on the Assignment of Receivables in International Trade,[30] which addressed that issue.

230. The Commission noted that the European Commission had adopted a regulation on the law applicable to contractual obligations (Rome I)[31] and that article 14 of the Rome I Regulation dealt with the law applicable to the relationship between an assignor and an assignee under a voluntary assignment or contractual subrogation of a claim and the relationship between the assignee and the debtor in a way that was consistent with the United Nations Assignment Convention and the Secured Transactions Guide. As to the law applicable to the proprietary effects of assignments, the Commission noted that the Rome I Regulation had not addressed the matter and that the European Commission was currently preparing a study.

231. The Commission agreed that a coordinated approach to the matter was in the interest of all States, as otherwise a different conflict-of-laws rule would apply depending on whether a dispute was brought before a court in a European Union member State or not. It was widely felt that such a result would undermine certainty as to the law applicable to the proprietary effects of assignments and create unnecessary obstacles to international receivables financing, which could not be distinguished from regional receivables financing. After discussion, the Commission requested the Secretariat to cooperate closely with the European Commission with a

[30] General Assembly resolution 56/81, annex.

[31] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of the European Union of 17 June 2008.

view to ensuring a coordinated approach to the matter, taking into account the approach followed in the United Nations Assignment Convention and the Secured Transactions Guide. The Commission also encouraged the European Commission to consider removing any obstacle to wide adoption of the United Nations Assignment Convention and the Secured Transactions Guide by States, including by European Union member States that wished to adopt them on the understanding that a future European Union instrument on the matter might limit their application.

IX. Current and possible future work in the area of electronic commerce

232. The Commission had before it a note by the Secretariat (A/CN.9/728 and Add.1) summarizing the discussions that had taken place at the colloquium on electronic commerce, held in New York from 14 to 16 February 2011.[32] The Commission was informed that the Secretariat received regular requests for expert input from other bodies in the United Nations system, as well as from other intergovernmental organizations, and that some of those requests called for a comprehensive discussion in a specialized forum and might therefore best be addressed in Working Group IV (Electronic Commerce).

233. The Commission took note of the information contained in the note prepared by the Secretariat. Broad consensus was expressed on the desirability of reconvening Working Group IV. In particular, it was noted that the past work of UNCITRAL in the field of electronic commerce offered a particularly significant contribution to the advancement of the use of electronic communications in international trade and that too long a lapse in the meetings of that Working Group might erode that leadership, as well as prevent UNCITRAL from updating and complementing existing legal standards in that rapidly evolving field. The view was also expressed, however, that none of the topics under consideration was ripe for discussion at the working group level and that therefore a decision on future meetings of Working Group IV should be further postponed.

234. The need to give a clear mandate to the Working Group was stressed; however, it was also indicated that many of the topics under consideration were, in practice, intersecting. It was further noted that that was particularly the case for electronic single-window facilities. It was suggested that, time and resources permitting, a reconvened Working Group should consider a recommendation pending in the United Nations Centre for Trade Facilitation and Electronic Business (CEFACT) that raised issues under UNCITRAL instruments.

235. Support was expressed for dealing on a priority basis with legal issues relating to the use of electronic transferable records. In particular, it was recalled that such work would be beneficial not only for the generic promotion of electronic communications in international trade but also for addressing some specific issues such as assisting in the implementation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

[32] Information about the colloquium is also available from www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html.

(the Rotterdam Rules).[33] Similarly, it was noted, other areas of the transport business, such as aviation, could benefit directly from the formulation of uniform legal standards in the field. It was also noted that the work regarding electronic transferable records might include certain aspects of the other topics discussed in document A/CN.9/728 and Add.1.

236. Some support was also expressed for dealing with legal issues relating to identity management; however, particular caution was recommended when discussing matters touching upon issues, such as privacy and data protection, that had important regulatory aspects. In that regard, it was added, it might be beneficial to wait for further developments so as to better define the terms of a possible future mandate for the Working Group.

237. The importance of mobile commerce, in particular for those countries where connectivity to the information and communication infrastructure was achieved mostly through mobile devices, was also mentioned. In that respect, it was recalled that most legal issues relating to the use of mobile devices were not different in nature from those posed by the use of other electronic devices. It was further said that, while certain mobile commerce practices might call for further study, caution should be used in order to avoid touching upon, on the one hand, issues relating to consumer protection and, on the other hand, issues relating to privacy and data protection.

238. After discussion, the Commission agreed that Working Group IV (Electronic Commerce) should be convened to undertake work in the field of electronic transferable records.

239. The Commission also agreed that the extension of the mandate of Working Group IV to other topics discussed in document A/CN.9/728 and Add.1 as discrete subjects (as opposed to their incidental relation to electronic transferable records) would be further considered at a future session.

240. With respect to legal issues relating to electronic single-window facilities, the Commission welcomed the ongoing cooperation between the Secretariat and other relevant organizations, including the World Customs Organization, and asked the Secretariat to contribute as appropriate, with a view to discussing relevant matters at the working group level when the progress of joint work offered a sufficient level of detail.

X. Possible future work in the area of microfinance

241. The Commission recalled its previous discussions on possible work in the area of microfinance.[34] At its current session, the Commission had before it a note by the Secretariat containing a summary of the proceedings of and the key issues identified at the international colloquium on microfinance, held in Vienna from 12 to 13 January 2011 (A/CN.9/727). The Commission was informed that at the

[33] General Assembly resolution 63/122, annex.

[34] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 432 and 433; and ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 275-276 and 280.

colloquium it was highlighted that, although there had been initiatives, often successful, in a number of States to address issues surrounding microfinance, there was no coherent set of global legal and regulatory measures that could serve as a standard for States wishing to legislate in accordance with international best practice. As noted by some participants, many States were now struggling to find an appropriate regulatory framework to promote financial inclusion through microfinance institutions. UNCITRAL legislative texts were mentioned as instrumental in strengthening a legislative and regulatory framework that could accommodate the needs of the microfinance industry. Subjects indicated included cross-border funding; secured transactions in microfinance, in order to enhance the availability of credit, in particular to small and medium-sized enterprises or clients that did not have sufficient capital or access to other kinds of credit; use of electronic money (e-money); and dispute resolution mechanisms to address the complaints of microfinance users.

242. It was said that conceiving a favourable legal and regulatory framework for microfinance raised various issues for consideration, which included:

(a) The nature and quality of the regulatory environment;

(b) The appropriateness of setting limits on interest rates chargeable on microfinance loans;

(c) Measures to address the problem of overindebtedness;

(d) The establishment and regulation of credit bureaux;

(e) Overcollateralization and the use of collateral with no economic value;

(f) Abusive collection practices;

(g) Foreign exchange risk where microfinance institutions obtained loan capital from abroad;

(h) Facilitating the handling of international remittances of funds by microfinance institutions on a cheaper and more efficient basis;

(i) E-money, including its status as savings; whether "issuers" of e-money were engaged in banking and hence what type of regulation they were subject to; and the coverage of such funds by deposit insurance schemes;

(j) Enhancing the predictability of the legal status of transactions conducted with mobile devices (for example, in the area of payment services);

(k) Facilitating the use of agent banking and other forms of branchless banking as a means to make financial services more accessible;

(l) Measures to promote financial literacy and increase the protection of clients against abusive or unscrupulous lending practices;

(m) Provision for fair, rapid, transparent and inexpensive processes for the resolution of disputes arising from microfinance transactions;

(n) Facilitating the use of, and ensuring transparency in, secured lending to microenterprises and small and medium-sized enterprises.

243. The Commission took note of the Secretariat's involvement in a United Nations inter-agency mechanism for the promotion of inclusive finance, and of the

fact that UNCITRAL was the only participant therein focusing on the legal and regulatory aspects of microfinance. The Secretariat was encouraged to continue its participation in that initiative and to keep abreast of developing legal and regulatory issues with respect to microfinance in order to contribute to the overall effort.

244. The Commission commended the Secretariat for the work done so far in the field of microfinance and expressed unanimous support for continuing work in that field. It was said that microfinance was an important tool for poverty alleviation and that in some countries it was a significant element of the national economy; hence developing a legislative framework for microfinance would prove extremely useful. It was generally felt that UNCITRAL could make a substantial contribution to that matter, as the existing legislative frameworks were not seen as fully adequate. It was explained that some States had recently adopted legislation in that field, and it was proposed that the experience of such States should be shared with others.

245. It was suggested that the work that could be implemented needed to be focused on certain well-defined matters and that the boundaries of the contemplated work should be further determined. It was therefore proposed to identify areas where specific work could be implemented and where further research would be needed as a result, keeping in mind the scope of the mandate of UNCITRAL and its traditional areas of work. It was also suggested that the relations established between UNCITRAL and international organizations active in the field of microfinance should continue to be developed. In particular, the UNCITRAL secretariat was encouraged to pursue the development of its relations with other United Nations bodies and agencies active in the field, as well as with the group responsible for financial inclusion in the Group of 20 Finance Ministers and Central Bank Governors, namely the Global Partnership for Financial Inclusion. The Secretariat was urged to be cautious with regard to unnecessary overlap or interference with matters of banking regulation, including matters of prudential regulation such as those addressed by the Basel Core Principles for Effective Banking Supervision.[35]

246. After discussion, the Commission agreed to include microfinance as an item for the future work of UNCITRAL and to further consider that matter at its next session, in 2012. In order to assist the Commission in defining the areas where work was needed, the Commission requested the Secretariat to circulate to all States a short questionnaire regarding their experience with the establishment of a legislative and regulatory framework for microfinance, including any obstacles they might have encountered in that regard, for consideration by the Commission at its next session. Further, the Commission agreed that, among the topics identified by the Secretariat and listed in paragraph 242 above, the Secretariat should, resources permitting, undertake research for consideration by the Commission at a later session on the items mentioned in subparagraphs (e), (i), (m) and (n) of paragraph 242. That work should be done bearing in mind the need for States to have in place an effective overall legal and regulatory framework for microfinance. The Secretariat was invited to consider further the areas of secured finance, dispute resolution and electronic commerce, in connection with microfinance. It was emphasized that the Secretariat should take account of work already carried out by other institutions in that field in order to avoid duplication of efforts.

[35] Available from www.bis.org/publ/bcbs129.htm.

XI. Endorsement of texts of other organizations: 2010 revision of the Uniform Rules for Demand Guarantees published by the International Chamber of Commerce

247. The International Chamber of Commerce requested the Commission to consider recommending the use of the 2010 revision of the Uniform Rules for Demand Guarantees (URDG 758), as it had done most recently with respect to the 2007 revision of the Chamber's Uniform Customs and Practice for Documentary Credits (UCP 600).[36]

248. The Commission recognized that the Uniform Rules for Demand Guarantees provided a new set of rules applicable to demand guarantees securing monetary and performance obligations in a wide array of international and domestic contracts. It was also noted that the Uniform Rules were fully compatible with the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit[37] prepared by the Commission in 1995 and endorsed by the International Chamber of Commerce in 1999.

249. Taking note of the significant revisions made to the previous version of the Uniform Rules and their usefulness in facilitating international trade, the Commission, at its 937th meeting, on 5 July 2011, agreed to recommend the use of the Uniform Rules in international trade and adopted the following decision:

The United Nations Commission on International Trade Law,

Expressing its appreciation to the International Chamber of Commerce for transmitting to it the revised text of the Uniform Rules for Demand Guarantees, which was approved by the Executive Board of the International Chamber of Commerce on 3 December 2009, with effect from 1 July 2010,

Congratulating the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by making its rules on demand guarantees clearer, more precise and more comprehensive while including innovative features reflecting recent practices,

Noting that the Uniform Rules for Demand Guarantees constitute a valuable contribution to the facilitation of international trade,

Commends the use of the 2010 revision of the Uniform Rules for Demand Guarantees, as appropriate, in transactions involving demand guarantees.

[36] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 356-357.

[37] United Nations, *Treaty Series*, vol. 2169, No. 38030.

XII. Monitoring implementation of the 1958 New York Convention

250. The Commission recalled its previous discussions on monitoring implementation of the 1958 New York Convention.[38] At its current session, the Commission was informed that the Secretariat was carrying out two complementary projects in that regard.

251. One project related to the publication on the UNCITRAL website of information contributed by States on their legislative implementation of the New York Convention. The Commission expressed its appreciation to States that had already contributed information and urged all States to continue providing the Secretariat with accurate information to ensure that the data published on the UNCITRAL website remained up to date.

252. The other project related to the preparation of a guide on the New York Convention. The Commission was informed that the preparation of the guide was currently being carried out by the Secretariat, in close cooperation with G. Bermann and E. Gaillard, who had established research teams to work on the project. The Commission expressed its appreciation for the steps taken so far and requested the Secretariat to pursue its efforts towards the preparation of the guide on the New York Convention. It was agreed that a more substantive presentation on progress made in the preparation of the guide would be made at a future session of the Commission (see also para. 207 above).

XIII. Technical assistance: law reform

A. General discussion

253. The Commission had before it a note by the Secretariat (A/CN.9/724) describing the technical cooperation and assistance activities undertaken subsequent to the date of the note on that topic submitted to the Commission at its forty-third session, in 2010 (A/CN.9/695 and Add.1). The Commission stressed the importance of such technical cooperation and assistance and expressed its appreciation for the activities undertaken by the Secretariat referred to in document A/CN.9/724. It was explained that legislative technical assistance, in particular to developing countries, was no less important an activity than the formulation of uniform rules itself. For that reason, the Secretariat was encouraged to continue to provide such assistance to the broadest extent possible and to improve its outreach, in particular to developing countries.

254. The Commission agreed on the need for a comprehensive approach to the furtherance of its mandate, based on a life cycle for uniform legislative texts comprised of four steps: identification of adequate topics of work; preparation of texts; adequate promotion of the adoption and use of those texts; and monitoring their uniform interpretation and application. It was noted that, while UNCITRAL

[38] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404; and ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 355 and 356.

had prepared a number of legislative standards, their rate of adoption varied significantly, and therefore the promotion of the adoption and use of those standards seemed to call for specific attention.

255. The Commission took note of the strategic framework for technical assistance suggested by the Secretariat (A/CN.9/724, paras. 10-48) and endorsed its priority lines of action, which included the following: stressing a regional and subregional approach in order not only to achieve economies of scale but also to complement ongoing regional integration initiatives; promoting the universal adoption of those international trade law texts already enjoying wide acceptance, namely the New York Convention (a United Nations convention adopted prior to the establishment of the Commission but actively promoted by the Commission) and the United Nations Convention on Contracts for the International Sale of Goods;[39] and making particular efforts to disseminate information on recently adopted texts, with a view, if such texts were treaties, to fostering their early adoption and entry into force. In that respect, the benefits relating to further academic and training activities, in particular for members of the judiciary and of the bar, were illustrated.

256. In relation to the promotion of recently adopted texts, the Commission heard a statement from the Comité Maritime International. The Comité commended UNCITRAL for its work and, in particular, for the preparation of the Rotterdam Rules. The Comité illustrated the number of benefits arising from the adoption of the Rotterdam Rules, which were described as a modern and comprehensive treaty that was able to address the needs of all operators involved in maritime transport. In reiterating its readiness to contribute to the promotion and implementation of the Rotterdam Rules, the Comité stressed the need for an early adherence to the Rotterdam Rules by all States so as to establish that text firmly and as soon as possible as the sole global standard in its field.

257. The desirability of ensuring better communication on the mandate and work of UNCITRAL between the Commission and the Secretariat on the one hand and the Commission and decision makers on trade law reform on the other hand was noted. It was suggested that UNCITRAL delegates and experts might be in a position to further contribute to the mandate of UNCITRAL by assisting in identifying those decision makers in the respective capitals.

258. The Commission noted that the continuing ability to respond to requests from States and regional organizations for technical cooperation and assistance activities was dependent upon the availability of funds to meet associated costs. The Commission further noted that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were very limited. Accordingly, requests for technical cooperation and assistance activities continued to be very carefully considered, and the number of such activities, which of late had mostly been carried out on a cost-share or no-cost basis, was limited. The Commission requested the Secretariat to continue exploring alternative sources of extrabudgetary funding, in particular by more extensively engaging permanent missions, as well as other possible partners in the public and private sectors.

259. The Commission appealed to all States to assist the Secretariat in identifying sources of available funding in their States or organizations that might partner with

[39] United Nations, *Treaty Series*, vol. 1489, No. 25567.

UNCITRAL to support technical cooperation and assistance activities to promote the use and adoption of UNCITRAL texts, as well as wider participation in the development of such activities. In particular, the Commission asked the Secretariat to circulate, both formally and informally, a questionnaire to take stock of existing and possible sources of funding for technical cooperation and assistance activities.

260. The Commission also reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions or as specific-purpose contributions, in order to facilitate planning and enable the Secretariat to meet the increasing number of requests from developing countries and countries with economies in transition for technical cooperation and assistance activities. The Commission expressed its appreciation to Indonesia for contributing to the Trust Fund since the Commission's forty-third session and to organizations that had contributed to the programme by providing funds or by hosting seminars.

261. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission. The Commission expressed its appreciation to Austria for contributing to the UNCITRAL Trust Fund since the Commission's forty-third session, thereby enabling travel assistance to be granted to developing countries that were members of UNCITRAL.

B. Establishing a regional presence of UNCITRAL

262. The Commission recalled that, at its forty-second session, in 2009, it had requested the Secretariat to explore the possibility of establishing a presence in regions or specific countries by, for example, having dedicated staff in United Nations field offices, collaborating with such existing field offices or establishing Commission country offices, with a view to facilitating the provision of technical assistance, in particular to developing countries, with respect to the use and adoption of UNCITRAL texts.[40] The General Assembly, in paragraph 10 (e) of its resolution 64/111, had noted that request.

263. The Commission was informed that the options available for establishing such a presence were limited because the regular budget of the Secretariat did not include funds for such activities and currently available extrabudgetary funds for technical assistance projects were scarce. Therefore, the Secretariat, in a note verbale dated 18 March 2011, had invited Member States of the United Nations to express their interest in establishing UNCITRAL regional centres in different parts of the world. States were asked to consider providing substantive financial contributions and necessary privileges and immunities, as well as office premises and facilities, to enable UNCITRAL regional centres to perform their functions.

264. The Commission was also informed that UNCITRAL regional centres, envisaged as project-based offices, would enhance international trade and

[40] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 363.

development by disseminating international trade norms and standards, in particular those elaborated by UNCITRAL, by providing bilateral and multilateral technical assistance, by undertaking coordination activities with international and regional organizations active in the region and by collecting relevant information about UNCITRAL-related activities, including enactments by States in the region. Regional centres would also function as a channel of communication between States in the region and UNCITRAL. Broad support was expressed for the establishment of regional centres, which was considered a novel yet important step for the Commission in reaching out and providing technical assistance to developing countries. Broad support was also expressed for the initiative undertaken by the Secretariat to that end.

265. As to the funding of UNCITRAL regional centres, it was understood that, under the limited resources currently available to the Secretariat, the establishment of a regional presence would have to rely entirely on extrabudgetary sources, including but not limited to voluntary contributions from States. In that context, the concern was raised that, while expansion of technical assistance through the establishment of regional centres would be beneficial to recipient States, it should not entail a burden on the already limited resources of the Secretariat. In response to that concern, it was explained that sources of funding would remain completely separate, since the Secretariat was entirely funded by the regular budget of the United Nations. While the Secretariat staff would obviously need to invest some of its time in establishing and monitoring the activities of the regional centres, including in the training of project personnel, a balanced approach would be taken to ensure that the benefits resulting from the establishment of a regional centre would outweigh any related cost associated with the time spent by the Secretariat staff on such activities. It was also indicated that the Commission would be regularly informed about the activities of regional centres. In that context, it was noted that regional centres would need to engage actively in fund-raising activities so as to maintain a self-sustaining budget.

266. The Commission noted that, as at 24 June 2011, the Dominican Republic, El Salvador, Kenya, Malaysia, the Republic of Korea and Singapore had formally expressed an interest in hosting an UNCITRAL regional centre. It also noted that several other States had expressed their support for the initiative. At the current session, Argentina also expressed an interest in hosting an UNCITRAL regional centre.

267. The Commission was informed of the specific offer received from the Republic of Korea for a pilot project whereby the Government of the Republic of Korea, through its Ministry of Justice and the Incheon Metropolitan City Office, had pledged the following for the establishment and operation of the "UNCITRAL Regional Centre for Asia and the Pacific":

- An annual financial contribution of $500,000 to the UNCITRAL Trust Fund for Symposia for an initial five-year period
- Office premises in Incheon, Republic of Korea, and other in-kind contributions, including equipment and furniture
- One loaned, non-reimbursable staff member (a legal expert) to engage in technical cooperation and assistance activities.

268. As Malaysia and Singapore also expressed a general interest in hosting an UNCITRAL regional centre in Asia and the Pacific, the Commission noted the possibility of establishing additional regional centres in that region. In that context, the Secretariat was requested to consult further with the relevant authorities of Malaysia and Singapore to ensure that a comprehensive and integrated approach would be implemented to maximize efficiency in providing technical assistance in Asia and the Pacific.

269. After discussion, the Commission expressed its appreciation to the Secretariat for taking the initiative to establish a regional presence of UNCITRAL and its gratitude to the Government of the Republic of Korea for its generous contribution to the pilot project. Accordingly, the Commission approved the establishment of an UNCITRAL Regional Centre for Asia and the Pacific in the Republic of Korea, subject to the relevant rules and regulations of the United Nations and the internal approval process in the Office of Legal Affairs.

270. The Secretariat was requested to keep the Commission informed of developments regarding the establishment of UNCITRAL regional centres, including the UNCITRAL Regional Centre for Asia and the Pacific, and in particular their funding and budget situations.

XIV. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts

271. The Commission considered a note by the Secretariat on the promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts (A/CN.9/726), which provided information on the current status of the CLOUT system and an update on work undertaken by the Secretariat on digests of case law relating to the United Nations Sales Convention and the Model Law on Arbitration. The Commission also drew attention to the resource-intensive nature of such work and the need for further resources to sustain it.

272. The Commission noted with appreciation the continuing work under the CLOUT system. As at 6 May 2011, 107 issues of compiled case-law abstracts from the CLOUT system had been prepared for publication, dealing with 1,055 cases relating mainly to the United Nations Sales Convention and the Model Law on Arbitration. The Commission noted the increase in the number of abstracts on the UNCITRAL Model Law on Cross-Border Insolvency and on the New York Convention, as well as the publication of abstracts related to the Convention on the Limitation Period in the International Sale of Goods.[41] The Commission also noted that a majority of the published abstracts concerned cases from Western European and other States and that the remainder concerned cases from other regions (Asia and the Pacific, Eastern Europe, Africa and Latin America and the Caribbean). A few abstracts referred to International Chamber of Commerce awards. The Commission expressed its appreciation to the national correspondents and other contributors for their work in developing the CLOUT system. The Secretariat was

[41] *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), part I.

encouraged to continue its efforts to extend the composition and vitality of the network of contributors to the CLOUT system.

273. The Commission was informed that a meeting of national correspondents would be held on 7 July 2011 and that it would discuss, among other issues, the revised digest of case law on the United Nations Sales Convention and the advanced work on the digest on the Model Law on Arbitration.

274. There was broad agreement that the CLOUT system, including the digests, continued to be an important aspect of the work undertaken by UNCITRAL for promoting the awareness, harmonization and uniform interpretation of UNCITRAL texts. The Commission thanked the Secretariat for its work in that area and expressed its full support for a call for increased resources to support and enlarge that work.

XV. Status and promotion of UNCITRAL legal texts

275. The Commission considered the status of the conventions and model laws emanating from its work and the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/723) and information obtained by the Secretariat subsequent to the submission of that note. The Commission noted with appreciation the information on the following treaty actions and legislative enactments received since its forty-third session regarding the following instruments:

(a) Convention on the Limitation Period in the International Sale of Goods, as amended, of 1980:[42] accession by the Dominican Republic (21 States parties);

(b) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958:[43] accession by Fiji (145 States parties);

(c) UNCITRAL Model Law on International Commercial Arbitration of 1985, with amendments as adopted in 2006:[44] new legislation based on the Model Law as amended in 2006 had been adopted in Australia (2010), Brunei Darussalam (2010), Costa Rica (2011), Georgia (2009), Malaysia (2005) and Hong Kong, China (2010);

(d) UNCITRAL Model Law on International Commercial Conciliation of 2002:[45] new legislation based on the Model Law had been adopted in Montenegro (2005) and in Canada, in the Province of Ontario (2010);

(e) United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea of 2008:[46] new signatures by the Democratic Republic of the Congo and Luxembourg and ratification by Spain (one State party);

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[42] *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), part I.

[43] United Nations, *Treaty Series*, vol. 330, No. 4739.

[44] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I; and ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

[45] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), annex I.

[46] General Assembly resolution 63/122, annex. The Convention has not yet entered into force; it requires 20 States parties for entry into force.

(f) UNCITRAL Model Law on Electronic Commerce of 1996:[47] new legislation based on the Model Law had been adopted in Bahrain (2002), Fiji (2008), Ghana (2008), Paraguay (2010), Qatar (2010), Rwanda (2010), Samoa (2008), Vanuatu (2000) and Zambia (2009);

(g) UNCITRAL Model Law on Electronic Signatures of 2001:[48] new legislation based on the Model Law had been adopted in Ghana (2008), Paraguay (2010), Qatar (2010), Rwanda (2010) and Zambia (2009); legislation influenced by the principles on which the Model Law was based had been adopted in Nicaragua (2010).

276. The Commission took note of the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/722) and noted with appreciation the influence of UNCITRAL legislative guides, practice guides and contractual texts. In that context, it was noted that Colombia had passed legislation responding to part three of the UNCITRAL Legislative Guide on Insolvency Law, on the treatment of enterprise groups in insolvency.[49]

XVI. Coordination and cooperation

A. General

277. The Commission had before it a note by the Secretariat (A/CN.9/725) providing information on the activities of other international organizations active in the field of international trade law in which the UNCITRAL secretariat had participated since the last note to the Commission on that topic (A/CN.9/707 and Add.1).[50]

278. The Commission noted with appreciation that, pursuant to General Assembly resolution 65/21,[51] the Secretariat had engaged in a dialogue with a number of organizations, including the European Union, the Hague Conference on Private International Law (the Hague Conference), the Organization for Economic Cooperation and Development, the UNCTAD-led Inter-Agency Cluster on Trade and Productive Capacity of the United Nations System Chief Executives Board for Coordination, Unidroit, the World Bank and the World Intellectual Property Organization. The Secretariat principally participated in expert groups, working groups and plenary meetings of those organizations, with the purpose of sharing

[47] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I.

[48] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II.

[49] Available in pre-release form from www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html.

[50] The notes by the Secretariat under the present agenda item are prepared pursuant to paragraph 5 (b) of General Assembly resolution 34/142 and in accordance with the mandate of UNCITRAL. In that resolution, the Assembly requested the Secretary-General to place before the Commission, at each of its sessions, a report on the legal activities of the international organs, organizations and bodies concerned with international trade law, together with recommendations as to the steps to be taken by the Commission to fulfil its mandate of coordinating the work of organizations active in the field of international trade law and encouraging cooperation among them.

[51] See para. 7 of the resolution.

information and expertise and avoiding duplication of work in the resultant work products. The Commission noted that that work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel of its secretariat. The Commission reiterated the importance of coordination work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and expressed its support for the use of travel funds for that purpose.

279. By way of example of current efforts at coordination, the Commission took note in particular of the activities involving the Hague Conference and Unidroit.

B. Coordination and cooperation in the field of security interests

280. The Commission had before it a paper prepared jointly by the Permanent Bureau of the Hague Conference and the secretariats of UNCITRAL and Unidroit with the assistance of outside experts (in particular, Neil Cohen and Steven Weise) and entitled "Comparison and analysis of major features of international instruments relating to secured transactions" (A/CN.9/720). It was noted that the Permanent Bureau of the Hague Conference and the secretariats of UNCITRAL and Unidroit planned to give that paper the widest possible dissemination, including by way of a United Nations sales publication to be issued in line with the relevant United Nations publication rules and the terms agreed upon with the Permanent Bureau of the Hague Conference and the secretariat of Unidroit.

281. The Commission welcomed the paper and expressed its appreciation to its secretariat, the Permanent Bureau of the Hague Conference and the secretariat of Unidroit, as well as to all experts involved in preparing the paper. It was widely felt that the paper was reflective of the kind of cooperation that the Commission had been supporting for years. It was also stated that, by summarizing the scope of application of the various instruments, showing how they could interact with one another and providing a comparative understanding of the basic themes covered by each instrument, the paper would be highly useful in assisting policymakers in States that wished to adopt all of those instruments. It was observed that the paper might pave the way for possible future papers explaining the interrelationship of texts prepared by the three organizations mentioned. In that context, however, it was noted that caution should be exercised to avoid creating uncertainty as to the relationship between the various texts that might be involved.

282. The suggestion was made that, in the context of the discussion of the Unidroit Model Law on Leasing,[52] reference should be made to the 1988 Unidroit Convention on International Financial Leasing[53] and to the fact that there was no overlap between the Unidroit Model Law and the 2001 Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment,[54] as the Unidroit Model Law excluded leasing of large aircraft equipment, unless otherwise agreed by the parties. The suggestion was also made that, in the context of the description of the assets covered by the 2009 Unidroit

[52] Available from www.unidroit.org/english/modellaws/2008leasing/main.htm.

[53] Available from www.unidroit.org/english/conventions/1988leasing/main.htm.

[54] Available from www.unidroit.org/english/conventions/mobile-equipment/main.htm.

Convention on Substantive Rules for Intermediated Securities,[55] reference should also be made to certain aspects relating to non-intermediated securities that were also covered.

283. After discussion, subject to addressing the above-mentioned suggestions in cooperation with the secretariat of Unidroit, the Commission approved the paper and requested that it be given the widest possible dissemination, including by way of a United Nations sales publication with proper recognition of the contribution of the Permanent Bureau of the Hague Conference and the secretariat of Unidroit.

C. Reports of other international organizations

284. The Commission took note of statements made on behalf of the following international organizations.

1. International Institute for the Unification of Private Law (Unidroit)

285. The Commission heard a statement on behalf of Unidroit. Unidroit welcomed the current coordination and cooperation with UNCITRAL and reaffirmed its commitment to cooperating closely with the Commission with a view to ensuring consistency, avoiding overlap and duplication in the work of the two organizations and making the best use of the resources made available by the respective member States. Mention was made of the document on the work of UNCITRAL, Unidroit and the Hague Conference in the area of secured transactions (see paras. 280-283 above) as a concrete joint product of that tripartite collaboration. Unidroit expressed its appreciation to UNCITRAL for having coordinated and sponsored that project and expressed the hope that a series of joint projects could follow.

286. Unidroit reported that:

(a) At the ninetieth session of the Unidroit Governing Council, held in Rome from 9 to 11 May 2011, the Council had adopted by acclamation the third edition of the Unidroit Principles of International Commercial Contracts (to be known as "Unidroit Principles 2010"). The new edition included four new chapters dealing with the unwinding of failed contracts, illegality, plurality of obligors and obligees, and conditional obligations. The Council authorized the publication and promotion of the Unidroit Principles 2010 worldwide and mandated the Unidroit secretariat to take the necessary steps to secure their formal endorsement by UNCITRAL;

(b) Unidroit was preparing the third protocol, dealing with space assets, of the 2001 Convention on International Interests on Mobile Equipment (the "Cape Town Convention"). As at 1 July 2011, there were 46 Contracting States to the Cape Town Convention and 40 Contracting States to the Aircraft Protocol. The Governing Council had authorized the Unidroit secretariat to transmit the text of the draft Protocol to a diplomatic conference for adoption. The Government of Germany had agreed to host such a conference, which would take place in Berlin from 27 February to 9 March 2012;

(c) Publication of the revised final version of the Official Commentary to the 2009 Unidroit Convention on Substantive Rules for Intermediated Securities should

[55] Available from www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm.

occur during the third quarter of 2011. In September 2010, the Unidroit secretariat organized a colloquium on financial markets law, with a view to identifying possible topics suitable for insertion in a future legislative guide on principles and rules that could enhance trading in securities in emerging markets. The presentations made at the colloquium were published in a special issue of the *Uniform Law Review* that had appeared earlier in 2011. Groundwork on the legislative guide on the principles and rules was under way and was expected to be reviewed at the second meeting of the Emerging Markets Committee (tentatively scheduled for 28 and 29 March 2012);

(d) Preparation of uniform principles and rules on the netting of financial instruments had been assigned the highest level of priority. The first meeting of the study group, composed of regulators, scholars and industry representatives, was held in Rome in April 2011. The next meeting would be held in September 2011;

(e) The Unidroit Governing Council had authorized the Unidroit secretariat to continue its consultations with relevant sectors so as to further develop an understanding of the potential scope and advantages of a possible fourth protocol to the Cape Town Convention, on agricultural, construction and mining equipment. The Unidroit secretariat intended to hold an industry consultation meeting in November 2011;

(f) In agreement with the Unidroit Governing Council, consultations with intergovernmental organizations, in particular the Food and Agriculture Organization of the United Nations and the International Fund for Agricultural Development, in the area of agricultural investment and production were being carried out to better explore synergies and develop joint projects. As follow-up, the Unidroit secretariat intended to organize a colloquium, which would also involve external experts, representatives of Governments of member States and representatives from professional circles, in particular from agribusiness and the finance industry, that were interested in private law issues and agricultural development. The colloquium was tentatively scheduled to be held from 8 to 10 November 2011 and should include a discussion on selection procedures for the award of agricultural projects to potential investors. The participation of UNCITRAL to address that topic would be appreciated;

(g) The Unidroit Governing Council had asked the Unidroit secretariat to conduct informal consultations with Governments and other organizations concerned, with a view to ascertaining the scope and feasibility of a possible international instrument on third-party liability for the malfunctioning of services supported by global navigation satellite systems. The Unidroit secretariat had already held an informal consultation meeting in October 2010, at which participants, while expressing differing views on the topic, had conveyed their general interest in continuing consultations;

(h) At its ninetieth session, the Governing Council requested the Unidroit secretariat to proceed with the convening of a follow-up committee of the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects,[56] which as at 1 July 2011 had 32 contracting States.

[56] Available from www.unidroit.org/english/conventions/1995culturalproperty/main.htm.

2. World Bank

287. The Commission heard a statement on behalf of the World Bank, in which appreciation was expressed to UNCITRAL and its secretariat for the continuing cooperation conducted with the World Bank. It was noted that over the past year the work of the World Bank in supporting the modernization of the legal enabling environment for economic growth and trade had been significantly enhanced by the work of UNCITRAL. In particular, the observer for the World Bank highlighted the work being done by the two organizations in establishing uniform legal frameworks for public procurement, arbitration and conciliation, insolvency and security interests. The adoption at the current session of the UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective (see para. 198 above), the ongoing work on the regulatory environment for registries and the exploratory work regarding the legal environment for microfinance were welcomed. Particular appreciation was expressed for UNCITRAL cooperation in the effort to develop a brief statement of standards for effective secured transactions regimes based on the Secured Transactions Guide and for the support offered to the World Bank Insolvency Task Force, which was beginning to consider the appropriateness and feasibility of identifying common principles across jurisdictions for addressing the problem of individual bankruptcy in the light of the emphasis on broad and inclusive access to finance (see para. 222 above). The World Bank also expressed its appreciation for the readiness of the UNCITRAL secretariat to help identify and marshal technical expertise to support the implementation of the Commission's legislative texts.

D. International governmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups

288. The Commission recalled that, at its forty-third session, in 2010, it had adopted the summary of conclusions on UNCITRAL rules of procedure and methods of work.[57] By paragraph 9 of the summary, the Commission had decided to draw up and update as necessary a list of international organizations and non-governmental organizations with which UNCITRAL entertained a long-standing cooperation and which had been invited to Commission sessions.

289. The Commission noted that the lists of intergovernmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups were made available to Member States online. The lists contained the full and abbreviated names of organizations, in English, French and/or Spanish, as appropriate, and provided a link to the websites, if any, of the listed organizations. The Commission further noted that the Secretariat systematically maintained the lists, in particular by including new organizations once it was decided to invite them to sessions of UNCITRAL or to sessions of any UNCITRAL working group.

290. The Commission was informed that since December 2010, when the lists had been first made available to the Member States online, six new non-governmental organizations had been added: Association droit et méditerranée (Jurimed),

[57] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex III.

Fondation pour le droit continental/Civil Law Initiative, International Federation of Purchasing and Supply Management, International Technology Law Association, National Center for Technology and Dispute Resolution and Tehran Regional Arbitration Centre.

291. Concern was expressed by some delegations that they had not received information about the lists and the procedure for obtaining access to them. In response to queries, it was explained that access to the lists was given to all United Nations Member States and that the relevant information had been communicated by the Secretariat to all Member States in a note verbale of 14 December 2010. It was agreed that the relevant information should be circulated again to all Member States. A number of delegations were of the view that it would be effective also to circulate that information to members of delegations to UNCITRAL.

292. The Secretariat confirmed that the lists contained the names of all organizations currently being invited to sessions of the Commission and its working groups. A suggestion was made that the lists should be made more user-friendly by grouping organizations to indicate the body whose sessions they were invited to attend. The Commission requested the Secretariat to restructure the lists to make it clear which organizations were being invited to which working group and which organizations were being invited to sessions of the Commission.

293. Concern was expressed by some delegations that the States members of the Commission were generally not consulted before new non-governmental organizations were added to the list. In response, the Secretariat observed that, while invitations were issued on behalf of the Commission or the working group, it would be too time-consuming and thus impractical to require that the Secretariat always consult member States before deciding to invite non-governmental organizations to sessions of the Commission or its working groups. It was recalled that there had been extensive discussion of that same issue at the previous four sessions of the Commission.

294. The suggestion was made that the Secretariat should circulate information about new non-governmental organizations that were being considered for invitation by way of a formal communication (i.e. a note verbale to permanent missions or permanent representatives) or an informal communication (e.g. an e-mail to representatives of States attending UNCITRAL sessions) before a working group began work on the newly assigned project. In response, concern was expressed about the practical consequences of the suggestion for the Secretariat, the Commission and its working groups, in particular if an invitation to an organization being objected to by a single State would result in preventing the invitation being issued until after the Commission had considered the matter at its annual session. It was generally agreed that cumbersome consultations by the Secretariat with all States before the decision to extend an invitation to any new non-governmental organization should be avoided.

295. The Secretariat explained the way in which it had proceeded on that matter since the end of the forty-third session of the Commission, in 2010: (a) the Secretariat made the preliminary decision to invite new organizations to sessions, on behalf of the Commission and its working groups; (b) at the same time that the invitation was extended to each such organization, the relevant list of invited

organizations accessible to Member States was updated; and (c) the Commission was informed at its annual session of any new organization added to the lists (see para. 290 above). It was noted that, if objections were raised to inviting any new organizations, such objections were expected to be addressed at the session by all member States of the Commission.

296. Some delegations suggested that the Secretariat should specifically draw the attention of States to each time a new organization was added to the list of invitees. After discussion, it was agreed that referring States to the updated lists available online should be sufficient. It was agreed that States should be reminded of the availability of the list as compiled and updated in accordance with paragraphs 292 and 295 above in the standard note verbale circulated to invite Governments to attend each session of UNCITRAL and its working groups. It was understood that any State willing to record an objection to any new organization being invited could communicate its objection to the Secretariat at any time.

297. A widely supported suggestion was that all documents related to the working methods of UNCITRAL should be made available on a dedicated web page of the UNCITRAL website. The Commission requested the Secretariat to update the website, as appropriate.

298. Another suggestion was that, with a view to increasing awareness of the standard-setting and technical assistance work of the Commission, the Secretariat should investigate the possibility of inviting a small number of prominent specialized law reviews to attend sessions of the Commission or its working groups as observers, on the understanding that those reviews would then disseminate information about new projects and existing standards. After discussion, that suggestion was adopted.

XVII. Role of UNCITRAL in promoting the rule of law at the national and international levels

A. Introduction

299. In paragraph 3 of its resolution 62/70, paragraph 7 of resolution 63/128 and paragraph 9 of resolution 64/116, the General Assembly invited the Commission to comment in its report to the Assembly on its current role in promoting the rule of law. The Commission recalled that it had subsequently transmitted its comments, as requested, in its annual reports to the Assembly.[58]

[58] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 385-386; ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 412-420; and ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 313-336.

B. Actions as regards relevant General Assembly resolutions at the current session

300. The Sixth Committee of the General Assembly had reached the understanding that comments related to the sub-topic of "rule of law and transitional justice in conflict and post-conflict situations", under the agenda item on the rule of law, should address, among other things, the role and future of national and international transitional justice and accountability mechanisms and informal justice systems. The Commission therefore decided that at its current session its comments to the General Assembly would focus on that sub-topic and the issues identified by the Sixth Committee from the perspective of the work of UNCITRAL.

301. The Commission held a panel discussion on that sub-topic, with the participation of UNCITRAL partners active in the implementation of commercial law reforms in the Balkan region. The panellists were requested to provide real-life examples of successful achievements and challenges so that such first-hand information could be relied upon in formulating the Commission's comments on its role in the promotion of the rule of law at the national and international levels in the relevant context to the General Assembly.

C. Summary of the panel discussion on the role of UNCITRAL in the promotion of the rule of law in conflict and post-conflict societies

302. The panellists emphasized that UNCITRAL instruments and resources, if properly used, could facilitate and expedite the transition from post-conflict recovery towards a more stable and inclusive economy. They also pointed to the unique nature of UNCITRAL and its expertise: no other organization was better equipped to provide internationally acceptable model laws and rules in the field of commercial law, support for enactments of uniform commercial laws and, especially, much-needed education and training. The point was made by all panellists that UNCITRAL should use the full range of its technical assistance and cooperation activities to assist post-conflict societies by providing technical assistance to organizations and Governments at the earliest possible time.

303. In the cross-border context, it was in particular emphasized that UNCITRAL provided a neutral, impartial and apolitical forum for the discussion of technical legal issues, which often enabled parties in cross-border conflicts to restart a dialogue. The impact of the work of UNCITRAL on facilitating regional economic integration, which was widely considered to be an effective deterrent against conflict (including by preventing post-conflict societies from sliding back into conflict), was also noted.

304. In the internal reconstruction context, the use of UNCITRAL instruments and other resources for local commercial law and institutional reforms was considered essential in order to quickly regain the trust of the international business community and donors, without which no flow of the finances needed for reconstruction was possible. In that context, reference was made in particular to UNCITRAL instruments in the areas of public procurement, commercial dispute settlement and contracts for the international sale of goods. It was reported that the fact that local commercial laws were based on internationally acceptable standards elaborated by

UNCITRAL constituted sufficient assurance for investors and donors as regards their quality. The need for the increased involvement of UNCITRAL in assistance with the enactment of laws based on its texts and with their interpretation and application was emphasized. Also stressed was the importance of translating UNCITRAL texts into the local languages of post-conflict societies to ensure better outreach to and understanding by intended end-users.

305. It was a well-known fact, it was said, that the judiciary in many countries, not only in post-conflict societies, was understaffed, experienced backlogs and lacked skilled personnel. It was acknowledged that judicial reform was neither easy nor fast to implement. Arbitration had proved to be a viable alternative for the resolution of disputes in societies, including post-conflict societies, facing problems with the judicial system. It was noted that, since arbitration centres as a rule were created by private initiative and administered privately, they were considerably easier and faster to set up and administer than courts. It was reported that some arbitration centres might in fact already have a grass-roots foundation in traditional dispute resolution mechanisms. The role of UNCITRAL instruments in facilitating the use of arbitration was emphasized.

306. Aspects of the work of UNCITRAL in the area of mediation and conciliation were also touched upon. The positive impact of mediation and conciliation on the general culture of dispute resolution in post-conflict societies, resulting in parties shifting from the position of adversaries to one of aiming at the amicable settlement of a dispute, was in particular noted. For such a positive change to occur, UNCITRAL instruments in that field alone were not considered sufficient. The active engagement of UNCITRAL and its partners in raising public awareness of such alternative means of dispute resolution, assisting in creating necessary mediation centres and building necessary skills was considered vital.

307. It was felt that, although it was obvious that arbitration and mediation and conciliation as regulated by UNCITRAL instruments were relevant in a commercial relations context, when experience with their use in that context proved to be positive, they also affected the way in which non-commercial disputes were resolved.

308. The role of such UNCITRAL resources as the CLOUT system (see paras. 271-274 above) in the context of the training of judges and judicial reforms was emphasized. Apart from being considered an important tool for facilitating the uniform interpretation and application of international commercial law standards by judges and arbitrators, the CLOUT system, it was reported, had an impact on the quality of judgements and arbitral awards delivered: where judges and arbitrators were aware that their judgements or awards would be used by CLOUT national correspondents for preparing abstracts for the CLOUT system, the quality of the judgements or awards that they delivered improved considerably.

309. The potential of some UNCITRAL instruments, for example in the area of public procurement, to facilitate the reintegration of some groups affected by conflict (such as aggrieved minorities, internally displaced persons, refugees and former combatants) into normal economic activity was noted. Such reintegration, it was explained, could be possible through margin-of-preference mechanisms and set-aside programmes, which, if applied in a transparent and strictly regulated manner, were allowed under UNCITRAL public procurement instruments. The different

nature of those instruments compared with other international instruments in that area (such as those formulated under the auspices of WTO or the European Union) that aimed primarily at opening local markets to international competition was noted, in particular that such UNCITRAL instruments were to be used as templates for national public procurement laws and thus balanced the goals of promoting international competition with the need to build local capacities and address other socio-economic policies of the State. By regulating both large- and small-scale procurement, such instruments would prove to be useful in post-conflict reconstruction contexts, where both types of procurement were highly relevant.

310. The impact of UNCITRAL on bringing informal sectors of the economy into the formal sector was emphasized. It was reported that a typical situation in post-conflict societies characterized by mistrust and dysfunctional legal enforcement mechanisms was for parties to commercial transactions to turn to informal ways of doing business (e.g. oral transactions on the spot between partners that knew each other). While that type of transaction could satisfy the daily basic needs of people, it did not create employment and was not conducive to economic progress. UNCITRAL instruments, in particular in the areas of contracts for the sale of goods and commercial dispute settlement, proved to be useful in creating (or recreating) a favourable legal environment for more regulated contract-based commercial relations, including in a cross-border context.

311. Specific examples of the use of UNCITRAL texts and other forms of UNCITRAL engagement in post-conflict societies were given. It was noted that the UNCITRAL Model Law on International Commercial Arbitration was the model for the Kosovo[59] Law on Arbitration adopted in January 2007. It was reported that the Kosovo Chamber of Commerce and the American Chamber of Commerce in Kosovo had endorsed the Kosovo Arbitration Rules patterned after the UNCITRAL Arbitration Rules and would soon consider the UNCITRAL Conciliation Rules when drafting their procedural rules for commercial mediation and amendments to the Kosovo Law on Mediation. It was noted that UNCITRAL had recently provided the United States Agency for International Development/Kosovo Systems for Enforcing Agreements and Decisions programme in Kosovo with materials used in the training of arbitrators in May and June of 2011.

312. With reference to document A/CN.9/724, which was before the Commission at the current session under agenda item 14 (see para. 253 above), it was noted that some technical assistance and cooperation activities of the UNCITRAL secretariat in recent years had been undertaken in cooperation with regional economic integration organizations that included as members post-conflict countries and had had a direct impact on those countries. For example, activities had been held on a regular basis in States parties to the Dominican Republic-Central America-United States Free Trade Agreement. Those activities were related, inter alia, to the adoption of UNCITRAL texts by the Dominican Republic, El Salvador and Honduras. Another example given was the UNCITRAL secretariat's contribution to the work of the East African Community Task Force on Cyberlaws, a joint initiative of the East African Community secretariat and UNCTAD aimed at the adoption of uniform laws on electronic transactions in the member States of the Community,

[59] All references to Kosovo in the present document should be understood to be in compliance with Security Council resolution 1244 (1999).

based, inter alia, on relevant UNCITRAL texts. It was noted that the UNCITRAL secretariat interacted with the Task Force on a regular basis. The legislation of Rwanda on electronic commerce (Law No. 18/2010 of 12 May 2010 relating to electronic messages, electronic signatures and electronic transactions) was prepared within that framework.

313. It was also reported that the UNCITRAL secretariat participated in the private sector development programme for Iraq, where, under the leadership of the United Nations Industrial Development Organization, support was being provided for the preparation of new Iraqi legislation on, inter alia, public procurement and alternative dispute resolution (arbitration and conciliation). That programme was aimed at creating and enabling an effective, coherent and comprehensive framework for private sector development in Iraq. Its goals included the enhancement of the legal and regulatory framework to foster economic growth. In particular, in March and April 2011, technical assistance was provided with regard to the drafting of public procurement legislation.

314. The Commission noted that the UNCITRAL secretariat had also provided comments and assistance to various international institutions that engaged in technical assistance activities in conflict and post-conflict societies. For example, it had provided comments on laws on mediation to the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) as part of its efforts to promote alternative dispute settlement in the Balkans, as well as to the International Finance Corporation, which provided technical assistance to numerous States in the field of dispute settlement, on various arbitration and mediation laws. The Commission noted with appreciation that the involvement of secretariat members in some of those projects was considered key to their successful conclusion. The UNCITRAL secretariat was also providing technical assistance to the World Bank in an effort to promote the adoption in Africa of the New York Convention.

315. The Commission noted the concern expressed in document A/CN.9/724 that the urgent need to counter global threats had attracted attention on a priority basis and demanded significant resources, to the detriment of other areas of work, including international trade law, whose role as an important development tool was often overlooked. International and internal conflicts had weakened the capacity of affected States, including their ability to engage in trade law reform. That had happened in spite of the fact that trade might provide an important contribution to post-conflict recovery, both by fostering economic development and by building mutual trust.

D. Conclusions

316. The Commission identified the relevance of its current work, in particular in the fields of arbitration and conciliation, public procurement and security rights registries, and its possible future work in the area of microfinance to post-conflict reconstruction in general and to some of the specific subjects identified by the Sixth Committee under that sub-topic (see para. 300 above).

317. The Commission noted the particular relevance of its instruments and resources for creating an environment conducive to post-conflict reconstruction and preventing societies from sliding back into conflict. Its instruments, if used for the

enactment of commercial laws in post-conflict societies, contributed to regaining the trust of the business community and donors that was lost or negatively affected as a result of the conflict. Its programmes and resources were also conducive to organizing institutions that supported economic activity, legal education and skills-building, such as chambers of commerce, bar associations and arbitration centres. Its instruments and resources also contributed to strengthening the judiciary (e.g. through the CLOUT system, which helped judges to better understand international commercial law standards and apply them in a uniform way). They could also make positive changes to dispute settlement strategies and behaviour in affected societies.

318. While acknowledging the need for UNCITRAL and its secretariat to be more actively engaged in post-conflict reconstruction, the Commission was of the view that, since it faced a lack of sufficient resources, its contribution in that context would remain modest or might even diminish unless innovative ways were found for the early engagement of UNCITRAL instruments and resources in post-conflict recovery operations by the United Nations and other donors (such as through the Department of Peacekeeping Operations, the Peacebuilding Commission, the United Nations Development Programme, the World Bank, the European Union and OSCE). The secretariat was encouraged to seek and develop partnerships to that end. It was noted that the establishment of UNCITRAL regional centres, discussed earlier at the current session (see paras. 262-270 above), should also facilitate achieving that goal.

319. It was considered necessary to achieve increased awareness about the work of UNCITRAL, in particular recognition that UNCITRAL dealt not only with complex sophisticated trade practices (such as the assignment of receivables) but also with the basic building blocks of any commercial activity (such as the sale of goods) and thus could make a real and immediate contribution in societies emerging from conflict. Such awareness should be achieved not only in the United Nations system but also among bilateral and multilateral donors, as well as in recipient countries and affected societies. The role of non-governmental organizations and academia in publicizing the relevance of the work of UNCITRAL in that context was noted. It was also suggested that means should be explored for more broadly disseminating UNCITRAL instruments, including by translating them into local languages in post-conflict societies.

320. The Commission reiterated its conviction that promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international level, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General. The Commission was looking forward to being part of strengthened and coordinated rule-of-law activities of the Organization.

E. High-level meeting of the General Assembly on the rule of law at the national and international levels in 2012

321. The attention of the Commission was drawn to paragraph 13 of General Assembly resolution 65/32. The Commission noted that it would be informed by the

Secretariat in due course of the agreed modalities of the high-level segment of the Assembly's sixty-seventh session on the rule of law at the national and international levels so that the Commission could explore at its next session, in 2012, ways and means of ensuring that aspects of the work of UNCITRAL were duly reflected in that meeting. The importance of not overlooking such aspects in discussions during that high-level meeting was noted.

XVIII. International commercial arbitration moot competitions

A. General remarks

322. The Commission noted with satisfaction that the Willem C. Vis International Commercial Arbitration Moot competition, which involved participants from all over the world, was a very successful educational initiative, having contributed both to the dissemination of information about UNCITRAL instruments and to the development of university courses dedicated to international commercial arbitration. Special appreciation was expressed to Eric Bergsten, former secretary of the Commission, for developing the moot competition and giving it direction since its inception during the 1993/94 academic year. Appreciation was also expressed to all institutions and persons involved in the preparation and conduct of the moot competitions.

323. The Commission took note with appreciation and expressed support for the continuation of preliminary consultations between the Secretariat, universities and other institutions in various parts of the world regarding the possibility of developing a moot court specifically designed to promote UNCITRAL insolvency standards. In that connection, it was suggested that future inspiration for moot courts could also be derived from UNCITRAL standards on security interests.

B. Willem C. Vis International Commercial Arbitration Moot 2011

324. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Eighteenth Moot. The oral arguments phase had taken place in Vienna from 15 to 21 April 2011. As in previous years, the Moot had been co-sponsored by the Commission. It was noted that the legal issues dealt with by the teams of students participating in the Eighteenth Moot had been based on the United Nations Sales Convention and the Arbitration Rules of the Chamber of Arbitration of Milan. A total of 254 teams from law schools in 63 countries had participated in the Eighteenth Moot. The best team in oral arguments was that of the University of Ottawa (Canada). The oral arguments of the Nineteenth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 30 March to 5 April 2012.

325. It was also noted that the Eighth Willem C. Vis (East) International Commercial Arbitration Moot had been organized by the Vis East Moot Foundation with the Chartered Institute of Arbitrators, East Asia Branch, and also co-sponsored by the Commission. The final phase had been organized in Hong Kong, China, from 4 to 10 April 2011. A total of 85 teams from 19 countries had taken part in the

Eighth (East) Moot. The winning team in the oral arguments was from Bond University (Australia). The Ninth (East) Moot would be held in Hong Kong, China, from 19 to 25 March 2012.

C. Madrid Commercial Arbitration Moot 2011

326. It was noted that Carlos III University of Madrid had organized the Third International Commercial Arbitration Competition in Madrid from 20 to 25 June 2011. The Madrid Moot had also been co-sponsored by the Commission. The legal issues involved in the competition were the international sale of goods (the United Nations Sales Convention), international transport (the Rotterdam Rules) and international commercial arbitration under the Model Law on Arbitration and the New York Convention. A total of nine teams from law schools or masters programmes in five countries had participated in the Madrid Moot in Spanish. The best team in oral arguments was from the University of Versailles (France). The Fourth Madrid Moot would be held in 2012 on dates yet to be confirmed.

XIX. Relevant General Assembly resolutions

327. The Commission took note with appreciation of the following four General Assembly resolutions adopted on 6 December 2010: resolution 65/21 on the report of the United Nations Commission on International Trade Law on the work of its forty-third session; resolution 65/22 on the UNCITRAL Arbitration Rules as revised in 2010; resolution 65/23 on the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property; and resolution 65/24 on part three of the UNCITRAL Legislative Guide on Insolvency Law.

XX. Other business

A. Internship programme

328. An oral report was presented on the internship programme at the UNCITRAL secretariat. It was in particular noted that, since the secretariat's oral report to the Commission at its forty-third session, in July 2010, 17 new interns had undertaken an internship with the UNCITRAL secretariat.

329. The Commission noted that the secretariat, in selecting interns from the roster of interns maintained and administered by the United Nations Office at Vienna, kept in mind the needs of UNCITRAL and its secretariat at any given period, in particular the need to maintain the UNCITRAL website in the six official languages of the United Nations. The Commission further noted that, when a sufficient pool of qualified candidates was available, the secretariat tried to ensure a balanced gender representation and representation from various geographical regions, paying particular attention to the needs of developing countries and countries with economies in transition.

330. During the period under review, the secretariat received, out of a total of 17 interns, 11 female interns and 12 interns from developing countries and countries

with economies in transition. The Commission noted that during the period under review the secretariat faced difficulties in finding on the roster of interns eligible and qualified candidates from African and Latin American and Caribbean States, as well as candidates with Arabic language skills.

B. Evaluation of the role of the Secretariat in facilitating the work of the Commission

331. It was recalled that, as indicated to the Commission at its fortieth session, in 2007,[60] the programme budget for the biennium 2008-2009 listed among the "expected accomplishments of the Secretariat" its contribution to facilitating the work of UNCITRAL. The performance measure of that expected accomplishment was the level of satisfaction of UNCITRAL with the services provided, as evidenced by a rating on a scale ranging from 1 to 5 (5 being the highest rating).[61] The Commission agreed to provide feedback to the Secretariat. It was recalled that a similar question regarding the level of satisfaction of UNCITRAL with the services provided by the Secretariat had been asked at the close of the forty-third session of the Commission.[62] It was further recalled that, at that session, the question had elicited replies from six delegations, with an average rating of 4.66.

C. Entitlement to summary records

332. At the request of the Conference Management Service at the United Nations Office at Vienna, the Commission was informed by the Chief of the Conference Management Service of proposals to substitute the production of summary records of UNCITRAL meetings with either: (a) unedited transcripts of proceedings, in all six official languages of the United Nations; or (b) digital recordings of proceedings, which would be searchable to some degree and could be made available on the UNCITRAL website. The objective of those changes would be to respond to calls for the reduction of expenditure on documentation throughout the United Nations. The Chief of the Conference Management Service indicated a possible range of savings that could be achieved as a result of the measures suggested. It was understood that none of the proposed changes would affect the record of proceedings of the current Commission session.

333. While acknowledging the need to address the issue of reducing costs throughout the United Nations Secretariat, the Commission emphasized the importance of records of its meetings being as comprehensive as possible to facilitate subsequent research of the legislative history of the legal standards prepared by UNCITRAL. The Commission noted that, under General Assembly resolution 49/221, it was entitled to summary records. Furthermore, the Commission noted that it had previously addressed the issue of the necessity of those summary records at its thirty-seventh session, in 2004. On that occasion, the Commission had

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[60] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 243.

[61] A/62/6 (Sect. 8) and Corr.1, table 8.19 (d).

[62] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 348.

been presented with the options of unedited verbatim transcripts or digital sound recordings and had determined that summary records were essential for its work.[63] From that perspective, the Commission's entitlement to summary records should not be parted with lightly. After discussion, the Commission expressed its willingness to discuss the matter again and agreed to revisit the matter at its next session, on the basis of a report to be prepared by the Secretariat setting out the issues and options involved.

XXI. Date and place of future meetings

A. Consideration of a budget proposal made by the Secretary-General affecting the alternating pattern of UNCITRAL meetings in New York and Vienna

334. The Commission was informed of a proposal made by the Secretary-General with the aim of reducing administrative costs involved in servicing UNCITRAL sessions by cutting the travel budget of Secretariat staff to service UNCITRAL meetings in New York. It was noted that the effect of the Secretary-General's proposal would be that the long-established practice of holding sessions of the Commission and its working groups alternately in New York and Vienna would be discontinued and thus, as from 2012, all sessions of the Commission and its Working Groups would be held in Vienna. It was also noted that, for that proposal to come into effect, decisions must be made by the Commission and the General Assembly. The Commission was also informed that the Secretary-General's budget proposal for 2012-2013 involved cutting not only travel funds required for the servicing of meetings in New York (a proposed reduction of $274,200 for the biennium 2012-2013, or 94.3 per cent of the 2010-2011 appropriation) but also resources budgeted for the following: hiring of consultants (a reduction of $20,000, or 23.6 per cent); travel of experts (a reduction of $39,100, or 17.8 per cent); other travel of Secretariat staff (a reduction of $22,800, or 20 per cent); and furniture and equipment (a reduction of $17,200, or 44.9 per cent), among other things. Altogether, the budget reduction proposed for UNCITRAL and its secretariat would amount to $364,700 for the biennium 2012-2013, or 5.2 per cent of the 2010-2011 appropriation. Bearing in mind that 84.2 per cent of the aggregate budget of the UNCITRAL secretariat was spent on staff posts, the proposed reduction would amount to 33 per cent of the non-post appropriation for 2010-2011.

335. The Commission took note of the proposal. Unanimous support was expressed for efforts to achieve savings across the United Nations.

336. The Commission recalled that the alternating pattern of meetings between New York and a European city (Geneva from 1969 to 1977 and Vienna since 1978) had been a feature of UNCITRAL throughout its existence. Among the reasons for such a changing venue that were put forward by States when the Commission was established and when its secretariat was transferred from New York to Vienna were the following: the proportionate distribution of travel costs among delegations; the influence and presence of UNCITRAL globally; and the needs of developing

[63] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 129-130.

countries, many of which did not have representation in Vienna. The Commission confirmed that those reasons remained as valid today as ever. It was recalled that, throughout the history of UNCITRAL, proposals had been made for holding some meetings of the Commission and its working groups in other regions of the world, so as to increase the visibility of UNCITRAL in those regions and worldwide. From that perspective, the current alternating pattern was already the result of a compromise that should not be unravelled. The Commission also recalled its decisions as regards ways and means of achieving better integration of UNCITRAL resources into other United Nations activities, such as joint rule-of-law programmes, development programmes and post-conflict reconstruction (see paras. 318-320 above). Implementing those decisions would require closer cooperation and coordination between the UNCITRAL secretariat and the relevant parts of the United Nations system located in New York.

337. Member States attending the current session unanimously felt that abolishing the alternating pattern of meetings would entail detrimental consequences to the ability of UNCITRAL to continue its work on the harmonization and unification of the law of international trade. That work, it was said, presupposed the fullest possible participation of States in sessions of the Commission and its working groups so that UNCITRAL standards achieved universal acceptability. It was emphasized that the special interests of developing countries should be taken into account to ensure their continued or increased representation in the work of UNCITRAL. In terms of perception, it was also important that the uniform instruments of UNCITRAL should be seen to be the result of worldwide consensus based on proper representation. Concern was expressed that the proposed change would contradict General Assembly resolution 2205 (XXI) on the establishment of UNCITRAL, as well as Assembly resolutions 2609 (XXIV) and 31/140, all of which dealt with the pattern of UNCITRAL conferences. In view of the above, the Commission expressed its unanimous support for the continuation of the current alternating pattern of meetings held by UNCITRAL.

338. Bearing in mind the current financial crisis, the Commission generally agreed that, while the proposed abolition of the alternating pattern of meetings should be avoided, every effort should be made to identify alternatives that would achieve an equal amount of savings. In response to a question, the Commission was informed that, according to a recent estimate, the costs of servicing a one-week meeting within the entitlement to conference services support for regular calendar meetings of UNCITRAL or its working groups amounted to $132,654, regardless of whether the meeting was held in New York or Vienna. That amount was approximately the same as the annual cost ($137,100) of Secretariat staff travelling to New York to service sessions of UNCITRAL and its working groups. The Commission was generally of the view that reducing its entitlement to conference services support by one week per year, while disruptive to its work programme, would constitute an acceptable alternative to abolishing its alternating pattern of meetings. In that context, the Commission noted that its current entitlement to conference services support amounted to 12 weeks per year for working group sessions and 3 weeks per year for the Commission session — a total of 15 weeks of conference services support per year. The possible savings would result in a reduction of that entitlement from 15 to 14 weeks of meetings per year.

339. The Commission understood that abolishing the alternating pattern of meetings, as opposed to eliminating one week of conference services support, although substantially equivalent for the overall budget of the United Nations, would not be equally reflected in the budget of the Office of Legal Affairs and, in particular, of the UNCITRAL secretariat. It was explained that savings achieved by eliminating one week of conference services support would appear under the budget of the Department for General Assembly and Conference Management, while savings achieved by eliminating the alternating pattern of meetings of UNCITRAL would appear under the budget of the Office of Legal Affairs. Concern was expressed as to whether the link between the proposed alternative savings in the Department for General Assembly and Conference Management budget and the operation of UNCITRAL would be sufficiently visible to the Fifth Committee of the General Assembly to be credited to the Office of Legal Affairs. A number of delegations expressed their confidence that compensation between two lines of the regular budget should be acceptable provided that sufficient explanations were given.

340. The Commission decided to propose the alternative to the General Assembly. It appealed to members of delegations represented at the forty-fourth session of the Commission to coordinate closely with representatives of their delegations in the Fifth and Sixth Committees when the proposal and reasons therefor were considered in those bodies. The understanding was that the final decision of the Commission on the date and place of sessions of UNCITRAL and its working groups in 2012 (see paras. 345, 349 and 350 below) would be deferred until the decision of the Assembly on the Secretary-General's proposal and the alternative proposal of the Commission was taken, which was expected to be in December 2011.

341. The Commission exchanged ideas as to possible additional ways of achieving savings on the budget of its secretariat. One delegation suggested reducing the number of personnel travelling to New York to service sessions. Other delegations were of the view that micromanagement should be avoided and flexibility should be preserved in that regard since some projects might require the involvement of more staff than others. Holding back-to-back sessions with mostly the same personnel servicing two or more sessions was also suggested. While there was general agreement that this might constitute a desirable goal, practical difficulties were highlighted, in particular since the dates were not always available for holding back-to-back sessions and the lack of expertise of the Secretariat staff in the topics considered in different working groups might detrimentally affect substantive secretariat services provided during sessions. As to the possibility of cutting posts in the UNCITRAL secretariat, the view was strongly held by a number of delegations that this should not be considered an acceptable way forward.

342. The Commission was invited to reconsider the frequency with which working groups met and the desirability of undertaking new projects. The view was shared that servicing six working groups stretched the resources of the UNCITRAL secretariat to the maximum and increased the risk that the quality of services would be negatively affected. Holding one session of a working group per year instead of the traditional two sessions (as was decided at the current session as regards Working Group I (see para. 184 above)) and temporarily suspending the activities of one working group were considered as options. For example, it was suggested that the Commission might decide at its next session to suspend the work of Working

Group VI once that working group completed work on its current project. Nevertheless, concerns about long suspensions of working group activities were expressed, since the prolonged inactivity might create doubt about the ability of UNCITRAL to maintain its level of expertise in a particular field. Electronic commerce and transport law were cited as examples.

343. Some delegations expressed the view that, in the light of the shortage of resources and the budgetary cuts faced by the UNCITRAL secretariat, the time was ripe for the Commission to engage in strategic planning by holding a comprehensive review of its current and future work programmes and more efficient ways to implement them. Prioritizing work on the various topics, clearly defining a time frame for a working group to complete its work and rationalizing the Commission's work, in particular the volume and contents of documentation, were considered to be among the issues worth considering in that context. More extensive resort to informal consultations for resolving controversial issues and to drafting groups for finalizing text, as had successfully been done during the current session in respect of the Model Law on Public Procurement, was suggested as a pattern to be considered to expedite decision-taking at plenary meetings of the Commission. Nevertheless, a note of caution was struck and it was generally agreed that any proposed changes should not negatively affect the flexibility of the methods by which the Commission had successfully operated and proved its effectiveness and efficiency. After discussion, the Commission requested the Secretariat to prepare for the next session of the Commission a note on strategic planning, with possible options and an assessment of their financial implications.

344. A number of delegations expressed concern over the fact that the full range of financial information, including existing documents containing budget proposals that might have a decisive impact on the work of the Commission and require policy decisions on its part, was not made available to the Commission as a matter of course.

B. Forty-fifth session of the Commission

345. The Commission approved the holding of its forty-fifth session in New York from 18 June to 6 July 2012 (or in Vienna from 9 to 27 July 2012). The Secretariat was requested to consider shortening the duration of the session by one week if the expected workload of the session would justify doing so.

C. Sessions of working groups

346. At its thirty-sixth session, in 2003, the Commission had agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group provided that such arrangement would not result in an increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in an increase of the 12-week allotment, that request should be reviewed by the Commission, with proper justification being

given by that working group regarding the reasons for which a change in the meeting pattern was needed.[64]

347. At the current session, in view of the extraordinary constraints placed on the Commission and its secretariat to reduce regular budget expenditures during the 2012-2013 biennium, the Commission agreed that its entitlement to 12 weeks of conference services per year for sessions of six working groups, together with its entitlement to three weeks of conference services per year for its own session, should be reduced so as not to exceed a total of 14 weeks of conference services instead of the habitual 15-week total entitlement per year. The Commission emphasized that its agreement to such a reduction in its use of conference services was conditional on the continued availability of a venue to hold sessions in New York, with full servicing by the Commission's secretariat as per established practice (see paras. 338-340 above).

348. The Secretariat was requested to consider cancelling working group sessions if the expected availability of resources or the workload of the session would justify doing so.

1. Sessions of working groups before the forty-fifth session of the Commission

349. The Commission approved the following schedule of meetings for its working groups:

(a) Working Group I (Procurement) would hold its twenty-first session in New York from 16 to 20 April 2012 (or in Vienna from 27 February to 2 March 2012);

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-fifth session in Vienna from 3 to 7 October 2011 and its fifty-sixth session in New York from 6 to 10 February 2012 (or in Vienna from 30 January to 3 February 2012);

(c) Working Group III (Online Dispute Resolution) would hold its twenty-fourth session in Vienna from 14 to 18 November 2011 and its twenty-fifth session in New York from 28 May to 1 June 2012 (or in Vienna from 7 to 11 May 2012);

(d) Working Group IV (Electronic Commerce) would hold its forty-fifth session in Vienna from 10 to 14 October 2011 and its forty-sixth session in New York from 13 to 17 February 2012 (or in Vienna from 9 to 13 January 2012);

(e) Working Group V (Insolvency Law) would hold its fortieth session in Vienna from 31 October to 4 November 2011 and its forty-first session in New York from 9 to 13 April 2012 (or in Vienna from 20 to 24 February 2012);

(f) Working Group VI (Security Interests) would hold its twentieth session in Vienna from 12 to 16 December 2011, and its twenty-first session in New York from 14 to 18 May 2012 (or in Vienna from 5 to 9 March 2012).

[64] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 275.

2. Sessions of working groups in 2012 after the forty-fifth session of the Commission

350. The Commission noted that tentative arrangements had been made for working group meetings in 2012 after its forty-fifth session (the arrangements were subject to the approval of the Commission at its forty-fifth session) as follows:

(a) Working Group II (Arbitration and Conciliation) would hold its fifty-seventh session in Vienna from 1 to 5 October 2012;

(b) Working Group III (Online Dispute Resolution) would hold its twenty-sixth session in Vienna from 10 to 14 December 2012;

(c) Working Group IV (Electronic Commerce) would hold its forty-seventh session in Vienna from 3 to 7 December 2012;

(d) Working Group V (Insolvency Law) would hold its forty-second session in Vienna from 26 to 30 November 2012;

(e) Working Group VI (Security Interests) would be expected to hold its twenty-second session in Vienna from 5 to 9 November 2012, unless it completed its work on the finalization of a text by the Commission at its forty-fifth session, in 2012.

Annex I

UNCITRAL Model Law on Public Procurement

Preamble

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement so as to promote the objectives of:

(a) Maximizing economy and efficiency in procurement;

(b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors regardless of nationality, thereby promoting international trade;

(c) Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement;

(d) Providing for the fair, equal and equitable treatment of all suppliers and contractors;

(e) Promoting the integrity of, and fairness and public confidence in, the procurement process;

(f) Achieving transparency in the procedures relating to procurement.

Be it therefore enacted as follows:

Chapter I. General provisions

Article 1

Scope of application

This Law applies to all public procurement.

Article 2

Definitions

For the purposes of this Law:

(a) "Currency" includes the monetary unit of account;

(b) "Direct solicitation" means solicitation addressed directly to one supplier or contractor or a restricted number of suppliers or contractors. This excludes solicitation addressed to a limited number of suppliers or contractors following pre-qualification or pre-selection proceedings;

(c) "Domestic procurement" means procurement limited to domestic suppliers or contractors pursuant to article 8 of this Law;

(d) "Electronic reverse auction" means an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves the presentation by suppliers or contractors of successively lowered bids during a scheduled period of time and the automatic evaluation of bids;

(e) "Framework agreement procedure" means a procedure conducted in two stages: a first stage to select a supplier (or suppliers) or a contractor (or contractors) to be a party (or parties) to a framework agreement with a procuring entity, and a second stage to award a procurement contract under the framework agreement to a supplier or contractor party to the framework agreement:

(i) "Framework agreement" means an agreement between the procuring entity and the selected supplier (or suppliers) or contractor (or contractors) concluded upon completion of the first stage of the framework agreement procedure;

(ii) "Closed framework agreement" means a framework agreement to which no supplier or contractor that is not initially a party to the framework agreement may subsequently become a party;

(iii) "Open framework agreement" means a framework agreement to which a supplier (or suppliers) or a contractor (or contractors) in addition to the initial parties may subsequently become a party or parties;

(iv) "Framework agreement procedure with second-stage competition" means a procedure under an open framework agreement or a closed framework agreement with more than one supplier or contractor in which certain terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded are to be established or refined through a second-stage competition;

(v) "Framework agreement procedure without second-stage competition" means a procedure under a closed framework agreement in which all terms and conditions of the procurement are established when the framework agreement is concluded;

(f) "Pre-qualification" means the procedure set out in article 18 of this Law to identify, prior to solicitation, suppliers or contractors that are qualified;

(g) "Pre-qualification documents" means documents issued by the procuring entity under article 18 of this Law that set out the terms and conditions of the pre-qualification proceedings;

(h) "Pre-selection" means the procedure set out in paragraph 3 of article 49 of this Law to identify, prior to solicitation, a limited number of suppliers or contractors that best meet the qualification criteria for the procurement concerned;

(i) "Pre-selection documents" means documents issued by the procuring entity under paragraph 3 of article 49 of this Law that set out the terms and conditions of the pre-selection proceedings;

(j) "Procurement" or "public procurement" means the acquisition of goods, construction or services by a procuring entity;

(k) "Procurement contract" means a contract concluded between the procuring entity and a supplier (or suppliers) or a contractor (or contractors) at the end of the procurement proceedings;

(l) "Procurement involving classified information" means procurement in which the procuring entity may be authorized by the procurement regulations or by

other provisions of law of this State to take measures and impose requirements for the protection of classified information;

(m) "Procurement regulations" means regulations enacted in accordance with article 4 of this Law;

(n) "Procuring entity" means:

Option I

(i) Any governmental department, agency, organ or other unit, or any subdivision or multiplicity thereof, that engages in procurement, except ...; [and]

Option II

(i) Any department, agency, organ or other unit, or any subdivision or multiplicity thereof, of the [Government] [*other term used to refer to the national Government of the enacting State*] that engages in procurement, except ...; [and]

(ii) [*The enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity"*];

(o) "Socio-economic policies" means environmental, social, economic and other policies of this State authorized or required by the procurement regulations or other provisions of law of this State to be taken into account by the procuring entity in the procurement proceedings. [*The enacting State may expand this subparagraph by providing an illustrative list of such policies.*];

(p) "Solicitation" means an invitation to tender, present submissions or participate in request-for-proposals proceedings or an electronic reverse auction;

(q) "Solicitation document" means a document issued by the procuring entity, including any amendments thereto, that sets out the terms and conditions of the given procurement;

(r) "Standstill period" means the period starting from the dispatch of a notice as required by paragraph 2 of article 22 of this Law, during which the procuring entity cannot accept the successful submission and during which suppliers or contractors can challenge, under chapter VIII of this Law, the decision so notified;

(s) "A submission (or submissions)" means a tender (or tenders), a proposal (or proposals), an offer (or offers), a quotation (or quotations) and a bid (or bids) referred to collectively or generically, including, where the context so requires, an initial or indicative submission (or submissions);

(t) "Supplier or contractor" means, according to the context, any potential party or any party to the procurement proceedings with the procuring entity;

(u) "Tender security" means a security required from suppliers or contractors by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation referred to in paragraph 1 (f) of article 17 of this Law and includes such arrangements as bank guarantees, surety bonds, standby letters of credit,

cheques for which a bank is primarily liable, cash deposits, promissory notes and bills of exchange. For the avoidance of doubt, the term excludes any security for the performance of the contract.

Article 3

International obligations of this State relating to procurement [and intergovernmental agreements within [this State]][65]

To the extent that this Law conflicts with an obligation of this State under or arising out of any:

(a) Treaty or other form of agreement to which it is a party with one or more other States; [or]

(b) Agreement entered into by this State with an intergovernmental international financing institution[,] [; or]

[(c) Agreement between the federal Government of [*name of federal State*] and any subdivision or subdivisions of [*name of federal State*] or between any two or more such subdivisions,]

the requirements of the treaty or agreement shall prevail, but in all other respects the procurement shall be governed by this Law.

Article 4

Procurement regulations

The [*name of the organ or authority authorized to promulgate the procurement regulations*] is authorized to promulgate procurement regulations to fulfil the objectives and to implement the provisions of this Law.

Article 5

Publication of legal texts

1. This Law, the procurement regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.

2. Judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public.

Article 6

Information on possible forthcoming procurement

1. Procuring entities may publish information regarding planned procurement activities for forthcoming months or years.

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[65] The text in brackets in this article is relevant to, and intended for consideration by, federal States.

2. Procuring entities may also publish an advance notice of possible future procurement.

3. Publication under this article does not constitute a solicitation, does not oblige the procuring entity to issue a solicitation and does not confer any rights on suppliers or contractors.

Article 7

Communications in procurement

1. Any document, notification, decision or other information generated in the course of a procurement and communicated as required by this Law, including in connection with challenge proceedings under chapter VIII or in the course of a meeting, or forming part of the record of procurement proceedings under article 25 of this Law shall be in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

2. Direct solicitation and communication of information between suppliers or contractors and the procuring entity referred to in article 16, paragraph 1 (d) of article 17, paragraphs 6 and 9 of article 18, paragraph 2 (a) of article 41 and paragraphs 2 to 4 of article 50 of this Law may be made by means that do not provide a record of the content of the information, on the condition that immediately thereafter confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

3. The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall specify:

(a) Any requirement of form;

(b) In procurement involving classified information, if the procuring entity considers it necessary, measures and requirements needed to ensure the protection of classified information at the requisite level;

(c) The means to be used to communicate information by or on behalf of the procuring entity to a supplier or contractor or to any person, or by a supplier or contractor to the procuring entity or other entity acting on its behalf;

(d) The means to be used to satisfy all requirements under this Law for information to be in writing or for a signature; and

(e) The means to be used to hold any meeting of suppliers or contractors.

4. The procuring entity may use only those means of communication that are in common use by suppliers or contractors in the context of the particular procurement. In any meeting held with suppliers or contractors, the procuring entity shall use only those means that ensure in addition that suppliers or contractors can fully and contemporaneously participate in the meeting.

5. The procuring entity shall put in place appropriate measures to secure the authenticity, integrity and confidentiality of information concerned.

Article 8

Participation by suppliers or contractors

1. Suppliers or contractors shall be permitted to participate in procurement proceedings without regard to nationality, except where the procuring entity decides to limit participation in procurement proceedings on the basis of nationality on grounds specified in the procurement regulations or other provisions of law of this State.

2. Except when authorized or required to do so by the procurement regulations or other provisions of law of this State, the procuring entity shall establish no other requirement aimed at limiting the participation of suppliers or contractors in procurement proceedings that discriminates against or among suppliers or contractors or against categories thereof.

3. The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare whether the participation of suppliers or contractors in the procurement proceedings is limited pursuant to this article and on which ground. Any such declaration may not later be altered.

4. A procuring entity that decides to limit the participation of suppliers or contractors in procurement proceedings pursuant to this article shall include in the record of the procurement proceedings a statement of the reasons and circumstances on which it relied.

5. The procuring entity shall make available to any person, upon request, its reasons for limiting the participation of suppliers or contractors in the procurement proceedings pursuant to this article.

Article 9

Qualifications of suppliers and contractors

1. This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings.

2. Suppliers or contractors shall meet such of the following criteria as the procuring entity considers appropriate and relevant in the circumstances of the particular procurement:

(a) That they have the necessary professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and personnel to perform the procurement contract;

(b) That they meet ethical and other standards applicable in this State;

(c) That they have the legal capacity to enter into the procurement contract;

(d) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended and they are not the subject of legal proceedings for any of the foregoing;

(e) That they have fulfilled their obligations to pay taxes and social security contributions in this State;

(f) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years [*the enacting State specifies the period of time*] preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or debarment proceedings.

3. Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide appropriate documentary evidence or other information to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph 2 of this article.

4. Any requirement established pursuant to this article shall be set out in the pre-qualification or pre-selection documents, if any, and in the solicitation documents and shall apply equally to all suppliers or contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this Law.

5. The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set out in the pre-qualification or pre-selection documents, if any, and in the solicitation documents.

6. Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with article 8 of this Law, the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof, or that is not objectively justifiable.

7. Notwithstanding paragraph 6 of this article, the procuring entity may require the legalization of documentary evidence provided by the supplier or contractor presenting the successful submission so as to demonstrate its qualifications for the particular procurement. In doing so, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

8. (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false or constituted a misrepresentation;

(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete;

(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor

may, however, be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity;

(d) The procuring entity may require a supplier or contractor that was pre-qualified in accordance with article 18 of this Law to demonstrate its qualifications again in accordance with the same criteria used to pre-qualify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate its qualifications again if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate its qualifications again as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

Article 10

Rules concerning description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement

1. (a) The pre-qualification or pre-selection documents, if any, shall set out a description of the subject matter of the procurement;

(b) The procuring entity shall set out in the solicitation documents the detailed description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied.

2. Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with article 8 of this Law, no description of the subject matter of a procurement that may restrict the participation of suppliers or contractors in or their access to the procurement proceedings, including any restriction based on nationality, shall be included or used in the pre-qualification or pre-selection documents, if any, or in the solicitation documents.

3. The description of the subject matter of the procurement may include specifications, plans, drawings, designs, requirements, testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology.

4. To the extent practicable, the description of the subject matter of the procurement shall be objective, functional and generic. It shall set out the relevant technical, quality and performance characteristics of that subject matter. There shall be no requirement for or reference to a particular trademark or trade name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the characteristics of the subject matter of the procurement and provided that words such as "or equivalent" are included.

5. (a) Standardized features, requirements, symbols and terminology relating to the technical, quality and performance characteristics of the subject matter of the procurement shall be used, where available, in formulating the description of the subject matter of the procurement to be included in the pre-qualification or pre-selection documents, if any, and in the solicitation documents;

(b) Due regard shall be had for the use of standardized trade terms and standardized conditions, where available, in formulating the terms and conditions of

the procurement and the procurement contract or the framework agreement to be entered into in the procurement proceedings, and in formulating other relevant aspects of the pre-qualification or pre-selection documents, if any, and solicitation documents.

Article 11

Rules concerning evaluation criteria and procedures

1. Except for the criteria set out in paragraph 3 of this article, the evaluation criteria shall relate to the subject matter of the procurement.

2. The evaluation criteria relating to the subject matter of the procurement may include:

(a) Price;

(b) The cost of operating, maintaining and repairing goods or of construction; the time for delivery of goods, completion of construction or provision of services; the characteristics of the subject matter of the procurement, such as the functional characteristics of goods or construction and the environmental characteristics of the subject matter; and the terms of payment and of guarantees in respect of the subject matter of the procurement;

(c) Where relevant in procurement conducted in accordance with articles 47, 49 and 50 of this Law, the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement.

3. In addition to the criteria set out in paragraph 2 of this article, the evaluation criteria may include:

(a) Any criteria that the procurement regulations or other provisions of law of this State authorize or require to be taken into account;

(b) A margin of preference for the benefit of domestic suppliers or contractors or for domestically produced goods, or any other preference, if authorized or required by the procurement regulations or other provisions of law of this State. The margin of preference shall be calculated in accordance with the procurement regulations.

4. To the extent practicable, all non-price evaluation criteria shall be objective, quantifiable and expressed in monetary terms.

5. The procuring entity shall set out in the solicitation documents:

(a) Whether the successful submission will be ascertained on the basis of price or price and other criteria;

(b) All evaluation criteria established pursuant to this article, including price as modified by any preference;

(c) The relative weights of all evaluation criteria, except where the procurement is conducted under article 49 of this Law, in which case the procuring entity may list all evaluation criteria in descending order of importance;

(d) The manner of application of the criteria in the evaluation procedure.

6. In evaluating submissions and determining the successful submission, the procuring entity shall use only those criteria and procedures that have been set out in the solicitation documents and shall apply those criteria and procedures in the manner that has been disclosed in those solicitation documents. No criterion or procedure shall be used that has not been set out in accordance with this provision.

Article 12

Rules concerning estimation of the value of procurement

1. A procuring entity shall neither divide its procurement nor use a particular valuation method for estimating the value of procurement so as to limit competition among suppliers or contractors or otherwise avoid its obligations under this Law.

2. In estimating the value of procurement, the procuring entity shall include the estimated maximum total value of the procurement contract or of all procurement contracts envisaged under a framework agreement over its entire duration, taking into account all forms of remuneration.

Article 13

Rules concerning the language of documents

1. The pre-qualification or pre-selection documents, if any, and the solicitation documents shall be formulated in [*the enacting State specifies its official language or languages*] [and in a language customarily used in international trade, unless decided otherwise by the procuring entity in the circumstances referred to in paragraph 4 of article 33 of this Law].

2. Applications to pre-qualify or for pre-selection, if any, and submissions may be formulated and presented in the language of the pre-qualification or pre-selection documents, if any, and solicitation documents, respectively, or in any other language permitted by those documents.

Article 14

Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions

1. The manner, place and deadline for presenting applications to pre-qualify or for pre-selection shall be set out in the invitation to pre-qualify or for pre-selection and in the pre-qualification or pre-selection documents, as applicable. The manner, place and deadline for presenting submissions shall be set out in the solicitation documents.

2. Deadlines for presenting applications to pre-qualify or for pre-selection or for presenting submissions shall be expressed as a specific date and time and shall allow sufficient time for suppliers or contractors to prepare and present their applications or submissions, taking into account the reasonable needs of the procuring entity.

3. If the procuring entity issues a clarification or modification of the pre-qualification, pre-selection or solicitation documents, it shall, prior to the applicable deadline for presenting applications to pre-qualify or for pre-selection or for presenting submissions, extend the deadline if necessary or as required under

paragraph 3 of article 15 of this Law in order to afford suppliers or contractors sufficient time to take the clarification or modification into account in their applications or submissions.

4. The procuring entity may, at its absolute discretion, prior to a deadline for presenting applications to pre-qualify or for pre-selection or for presenting submissions, extend the applicable deadline if it is not possible for one or more suppliers or contractors to present their applications or submissions by the deadline initially stipulated because of any circumstance beyond their control.

5. Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the pre-qualification, pre-selection or solicitation documents.

Article 15

Clarifications and modifications of solicitation documents

1. A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting submissions. The procuring entity shall respond within a time period that will enable the supplier or contractor to present its submission in a timely fashion and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

2. At any time prior to the deadline for presenting submissions, the procuring entity may for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

3. If as a result of a clarification or modification issued in accordance with this article, the information published when first soliciting the participation of suppliers or contractors in the procurement proceedings becomes materially inaccurate, the procuring entity shall cause the amended information to be published in the same manner and place in which the original information was published and shall extend the deadline for presentation of submissions as provided for in paragraph 3 of article 14 of this Law.

4. If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their submissions.

Article 16

Clarification of qualification information and of submissions

1. At any stage of the procurement proceedings, the procuring entity may ask a supplier or contractor for clarification of its qualification information or of its submission, in order to assist in the ascertainment of qualifications or the examination and evaluation of submissions.

2. The procuring entity shall correct purely arithmetical errors that are discovered during the examination of submissions. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that presented the submission concerned.

3. No substantive change to qualification information or to a submission, including changes aimed at making an unqualified supplier or contractor qualified or an unresponsive submission responsive, shall be sought, offered or permitted.

4. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to qualification information or submissions, nor shall any change in price be made pursuant to a clarification that is sought under this article.

5. Paragraph 4 of this article shall not apply to proposals submitted under articles 49, 50, 51 and 52 of this Law.

6. All communications generated under this article shall be included in the record of the procurement proceedings.

Article 17

Tender securities

1. When the procuring entity requires suppliers or contractors presenting submissions to provide a tender security:

(a) The requirement shall apply to all suppliers or contractors;

(b) The solicitation documents may stipulate that the issuer of the tender security and the confirmer, if any, of the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity. In cases of domestic procurement, the solicitation documents may in addition stipulate that the tender security shall be issued by an issuer in this State;

(c) Notwithstanding the provisions of subparagraph (b) of this paragraph, a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an issuer in this State if the tender security and the issuer otherwise conform to requirements set out in the solicitation documents, unless the acceptance by the procuring entity of such a tender security would be in violation of a law of this State;

(d) Prior to presenting a submission, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the tender security

on the ground that the issuer or the confirmer, as the case may be, has become insolvent or has otherwise ceased to be creditworthy;

(f) The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security. Any requirement that refers directly or indirectly to the conduct of the supplier or contractor presenting the submission may relate only to:

(i) Withdrawal or modification of the submission after the deadline for presenting submissions, or before the deadline if so stipulated in the solicitation documents;

(ii) Failure to sign a procurement contract if so required by the solicitation documents; and

(iii) Failure to provide a required security for the performance of the contract after the successful submission has been accepted or failure to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

2. The procuring entity shall make no claim to the amount of the tender security and shall promptly return, or procure the return of, the security document after the earliest of the following events:

(a) The expiry of the tender security;

(b) The entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;

(c) The cancellation of the procurement;

(d) The withdrawal of a submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.

Article 18

Pre-qualification proceedings

1. The procuring entity may engage in pre-qualification proceedings with a view to identifying, prior to solicitation, suppliers and contractors that are qualified. The provisions of article 9 of this Law shall apply to pre-qualification proceedings.

2. If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published in the publication identified in the procurement regulations. Unless decided otherwise by the procuring entity in the circumstances referred to in paragraph 4 of article 33 of this Law, the invitation to pre-qualify shall also be published internationally, so as to be widely accessible to international suppliers or contractors.

3. The invitation to pre-qualify shall include the following information:

(a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into in the procurement proceedings, including the nature, quantity and place of delivery of the goods to be supplied, the nature and location of the construction to be effected or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods, the completion of the construction or the provision of the services;

(c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article 9 of this Law;

(d) A declaration as required by article 8 of this Law;

(e) The means of obtaining the pre-qualification documents and the place where they may be obtained;

(f) The price, if any, to be charged by the procuring entity for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents;

(g) If a price is to be charged, the means of payment for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents, and the currency of payment;

(h) The language or languages in which the pre-qualification documents and, subsequent to pre-qualification, the solicitation documents are available;

(i) The manner, place and deadline for presenting applications to pre-qualify and, if already known, the manner, place and deadline for presenting submissions, in conformity with article 14 of this Law.

4. The procuring entity shall provide a set of pre-qualification documents to each supplier or contractor that requests them in accordance with the invitation to pre-qualify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the pre-qualification documents shall reflect only the cost of providing them to suppliers or contractors.

5. The pre-qualification documents shall include the following information:

(a) Instructions for preparing and presenting pre-qualification applications;

(b) Any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;

(c) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the pre-qualification proceedings without the intervention of an intermediary;

(d) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the pre-qualification proceedings, and the place where those laws and regulations may be found;

(e) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of applications to pre-qualify and to the pre-qualification proceedings.

6. The procuring entity shall respond to any request by a supplier or contractor for clarification of the pre-qualification documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting applications to pre-qualify. The procuring entity shall respond within a time period that will enable the supplier or contractor to present its application to pre-qualify in a timely fashion. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity has provided the pre-qualification documents.

7. The procuring entity shall take a decision with respect to the qualifications of each supplier or contractor presenting an application to pre-qualify. In reaching that decision, the procuring entity shall apply only the criteria and procedures set out in the invitation to pre-qualify and in the pre-qualification documents.

8. Only suppliers or contractors that have been pre-qualified are entitled to participate further in the procurement proceedings.

9. The procuring entity shall promptly notify each supplier or contractor presenting an application to pre-qualify whether or not it has been pre-qualified. It shall also make available to any person, upon request, the names of all suppliers or contractors that have been pre-qualified.

10. The procuring entity shall promptly communicate to each supplier or contractor that has not been pre-qualified the reasons therefor.

Article 19

Cancellation of the procurement

1. The procuring entity may cancel the procurement at any time prior to the acceptance of the successful submission and, after the successful submission is accepted, under the circumstances referred to in paragraph 8 of article 22 of this Law. The procuring entity shall not open any tenders or proposals after taking a decision to cancel the procurement.

2. The decision of the procuring entity to cancel the procurement and the reasons for the decision shall be included in the record of the procurement proceedings and promptly communicated to any supplier or contractor that presented a submission. The procuring entity shall in addition promptly publish a notice of the cancellation of the procurement in the same manner and place in which the original information regarding the procurement proceedings was published, and return any tenders or proposals that remain unopened at the time of the decision to the suppliers or contractors that presented them.

3. Unless the cancellation of the procurement is a consequence of irresponsible or dilatory conduct on the part of the procuring entity, the procuring entity shall incur no liability, solely by virtue of its invoking paragraph 1 of this article, towards suppliers or contractors that have presented submissions.

Article 20

Rejection of abnormally low submissions

1. The procuring entity may reject a submission if the procuring entity has determined that the price, in combination with other constituent elements of the submission, is abnormally low in relation to the subject matter of the procurement and raises concerns with the procuring entity as to the ability of the supplier or contractor that presented that submission to perform the procurement contract, provided that the procuring entity has taken the following actions:

(a) The procuring entity has requested in writing from the supplier or contractor details of the submission that gives rise to concerns as to the ability of the supplier or contractor to perform the procurement contract; and

(b) The procuring entity has taken account of any information provided by the supplier or contractor following this request and the information included in the submission, but continues, on the basis of all such information, to hold concerns.

2. The decision of the procuring entity to reject a submission in accordance with this article, the reasons for that decision, and all communications with the supplier or contractor under this article shall be included in the record of the procurement proceedings. The decision of the procuring entity and the reasons therefor shall be promptly communicated to the supplier or contractor concerned.

Article 21

Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest

1. A procuring entity shall exclude a supplier or contractor from the procurement proceedings if:

(a) The supplier or contractor offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, so as to influence an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings; or

(b) The supplier or contractor has an unfair competitive advantage or a conflict of interest, in violation of provisions of law of this State.

2. Any decision of the procuring entity to exclude a supplier or contractor from the procurement proceedings under this article and the reasons therefor shall be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.

Article 22

Acceptance of the successful submission and entry into force of the procurement contract

1. The procuring entity shall accept the successful submission unless:

(a) The supplier or contractor presenting the successful submission is disqualified in accordance with article 9 of this Law;

(b) The procurement is cancelled in accordance with paragraph 1 of article 19 of this Law;

(c) The submission found successful at the end of evaluation is rejected as abnormally low under article 20 of this Law; or

(d) The supplier or contractor presenting the successful submission is excluded from the procurement proceedings on the grounds specified in article 21 of this Law.

2. The procuring entity shall promptly notify each supplier or contractor that presented submissions of its decision to accept the successful submission at the end of the standstill period. The notice shall contain, at a minimum, the following information:

(a) The name and address of the supplier or contractor presenting the successful submission;

(b) The contract price or, where the successful submission was ascertained on the basis of price and other criteria, the contract price and a summary of other characteristics and relative advantages of the successful submission; and

(c) The duration of the standstill period as set out in the solicitation documents and in accordance with the requirements of the procurement regulations. The standstill period shall run from the date of the dispatch of the notice under this paragraph to all suppliers or contractors that presented submissions.

3. Paragraph 2 of this article shall not apply to awards of procurement contracts:

(a) Under a framework agreement procedure without second-stage competition;

(b) Where the contract price is less than the threshold amount set out in the procurement regulations; or

(c) Where the procuring entity determines that urgent public interest considerations require the procurement to proceed without a standstill period. The decision of the procuring entity that such urgent considerations exist and the reasons for the decision shall be included in the record of the procurement proceedings.

4. Upon expiry of the standstill period or, where there is none, promptly after the successful submission was ascertained, the procuring entity shall dispatch the notice of acceptance of the successful submission to the supplier or contractor that presented that submission, unless the [*name of court or courts*] or the [*name of the relevant organ designated by the enacting State*] orders otherwise.

5. Unless a written procurement contract and/or approval by another authority is/are required, a procurement contract in accordance with the terms and conditions

of the successful submission enters into force when the notice of acceptance is dispatched to the supplier or contractor concerned, provided that the notice is dispatched while the submission is still in effect.

6. Where the solicitation documents require the supplier or contractor whose submission has been accepted to sign a written procurement contract conforming to the terms and conditions of the accepted submission:

(a) The procuring entity and the supplier or contractor concerned shall sign the procurement contract within a reasonable period of time after the notice of acceptance is dispatched to the supplier or contractor concerned;

(b) Unless the solicitation documents stipulate that the procurement contract is subject to approval by another authority, the procurement contract enters into force when the contract is signed by the supplier or contractor concerned and by the procuring entity. Between the time when the notice of acceptance is dispatched to the supplier or contractor concerned and the entry into force of the procurement contract, neither the procuring entity nor that supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

7. Where the solicitation documents stipulate that the procurement contract is subject to approval by another authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of submissions specified in the solicitation documents or the period of effectiveness of the tender security required under article 17 of this Law, unless extended under the provisions of this Law.

8. If the supplier or contractor whose submission has been accepted fails to sign any written procurement contract as required or fails to provide any required security for the performance of the contract, the procuring entity may either cancel the procurement or decide to select the next successful submission from among those remaining in effect, in accordance with the criteria and procedures set out in this Law and in the solicitation documents. In the latter case, the provisions of this article shall apply mutatis mutandis to such submission.

9. Notices under this article are dispatched when they are promptly and properly addressed or otherwise directed and transmitted to the supplier or contractor or conveyed to an appropriate authority for transmission to the supplier or contractor by any reliable means specified in accordance with article 7 of this Law.

10. Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given promptly to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.

Article 23

Public notice of the award of a procurement contract or framework agreement

1. Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the name of the supplier (or suppliers) or contractor (or contractors) to which the procurement contract or the framework agreement was awarded and, in the case of procurement contracts, the contract price.

2. Paragraph 1 is not applicable to awards where the contract price is less than the threshold amount set out in the procurement regulations. The procuring entity shall publish a cumulative notice of such awards from time to time but at least once a year.

3. The procurement regulations shall provide for the manner of publication of the notices required under this article.

Article 24

Confidentiality

1. In its communications with suppliers or contractors or with any person, the procuring entity shall not disclose any information if non-disclosure of such information is necessary for the protection of essential security interests of the State or if disclosure of such information would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition, unless disclosure of that information is ordered by the [*name of the court or courts*] or the [*name of the relevant organ designated by the enacting State*] and, in such case, subject to the conditions of such an order.

2. Other than when providing or publishing information pursuant to paragraphs 2 and 10 of article 22 and to articles 23, 25 and 42 of this Law, the procuring entity shall treat applications to pre-qualify or for pre-selection and submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors or to any other person not authorized to have access to this type of information.

3. Any discussions, communications, negotiations or dialogue between the procuring entity and a supplier or contractor pursuant to paragraph 3 of article 48 and to articles 49 to 52 of this Law shall be confidential. Unless required by law or ordered by the [*name of the court or courts*] or the [*name of the relevant organ designated by the enacting State*], no party to any such discussions, communications, negotiations or dialogue shall disclose to any other person any technical, price or other information relating to these discussions, communications, negotiations or dialogue without the consent of the other party.

4. Subject to the requirements in paragraph 1 of this article, in procurement involving classified information, the procuring entity may:

(a) Impose on suppliers or contractors requirements aimed at protecting classified information; and

(b) Demand that suppliers or contractors ensure that their sub-contractors comply with requirements aimed at protecting classified information.

Article 25

Documentary record of procurement proceedings

1. The procuring entity shall maintain a record of the procurement proceedings that includes the following information:

(a) A brief description of the subject matter of the procurement;

(b) The names and addresses of suppliers or contractors that presented submissions, the name and address of the supplier (or suppliers) or contractor (or contractors) with which the procurement contract is entered into and the contract price (and, in the case of a framework agreement procedure, the name and address of the supplier (or suppliers) or contractor (or contractors) with which the framework agreement is concluded);

(c) A statement of the reasons and circumstances relied upon by the procuring entity for the decision as regards means of communication and any requirement of form;

(d) In procurement proceedings in which the procuring entity, in accordance with article 8 of this Law, limits the participation of suppliers or contractors, a statement of the reasons and circumstances relied upon by the procuring entity for imposing such a limit;

(e) If the procuring entity uses a method of procurement other than open tendering, a statement of the reasons and circumstances relied upon by the procuring entity to justify the use of such other method;

(f) In the case of procurement by means of an electronic reverse auction or involving an electronic reverse auction as a phase preceding the award of the procurement contract, a statement of the reasons and circumstances relied upon by the procuring entity for the use of the auction and information about the date and time of the opening and closing of the auction;

(g) In the case of a framework agreement procedure, a statement of the reasons and circumstances upon which it relied to justify the use of a framework agreement procedure and the type of framework agreement selected;

(h) If the procurement is cancelled pursuant to paragraph 1 of article 19 of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision to cancel the procurement;

(i) If any socio-economic policies were considered in the procurement proceedings, details of such policies and the manner in which they were applied;

(j) If no standstill period was applied, a statement of the reasons and circumstances relied upon by the procuring entity in deciding not to apply a standstill period;

(k) In the case of a challenge or appeal under chapter VIII of this Law, a copy of the application for reconsideration or review and the appeal, as applicable,

and a copy of all decisions taken in the relevant challenge or appeal proceedings, or both, and the reasons therefor;

(l) A summary of any requests for clarification of the pre-qualification or pre-selection documents, if any, or of the solicitation documents and the responses thereto, as well as a summary of any modifications to those documents;

(m) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented applications to pre-qualify or for pre-selection, if any, or submissions;

(n) If a submission is rejected pursuant to article 20 of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision;

(o) If a supplier or contractor is excluded from the procurement proceedings pursuant to article 21 of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision;

(p) A copy of the notice of the standstill period given in accordance with paragraph 2 of article 22 of this Law;

(q) If the procurement proceedings resulted in the award of a procurement contract in accordance with paragraph 8 of article 22 of this Law, a statement to that effect and of the reasons therefor;

(r) The contract price and other principal terms and conditions of the procurement contract; where a written procurement contract has been concluded, a copy thereof. (In the case of a framework agreement procedure, in addition a summary of the principal terms and conditions of the framework agreement or a copy of any written framework agreement that was concluded);

(s) For each submission, the price and a summary of the other principal terms and conditions;

(t) A summary of the evaluation of submissions, including the application of any preference pursuant to paragraph 3 (b) of article 11 of this Law, and the reasons and circumstances on which the procuring entity relied to justify any rejection of bids presented during the auction;

(u) Where exemptions from disclosure of information were invoked under paragraph 1 of article 24 or under article 69 of this Law, the reasons and circumstances relied upon in invoking them;

(v) In procurement involving classified information, any requirements imposed on suppliers or contractors for the protection of classified information pursuant to paragraph 4 of article 24 of this Law; and

(w) Other information required to be included in the record in accordance with the provisions of this Law or the procurement regulations.

2. The portion of the record referred to in subparagraphs (a) to (k) of paragraph 1 of this article shall, on request, be made available to any person after the successful submission has been accepted or the procurement has been cancelled.

3. Subject to paragraph 4 of this article, or except as disclosed pursuant to paragraph 3 of article 42 of this Law, the portion of the record referred to in

subparagraphs (p) to (t) of paragraph 1 of this article shall, after the decision on acceptance of the successful submission has become known to them, be made available, upon request, to suppliers or contractors that presented submissions.

4. Except when ordered to do so by the [*name of court or courts*] or the [*name of the relevant organ designated by the enacting State*], and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information from the record of the procurement proceedings if its non-disclosure is necessary for the protection of essential security interests of the State or if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition;

(b) Information relating to the examination and evaluation of submissions, other than the summary referred to in subparagraph (t) of paragraph 1 of this article.

5. The procurement entity shall record, file and preserve all documents relating to the procurement proceedings, according to procurement regulations or other provisions of law of this State.

Article 26

Code of conduct

A code of conduct for officers or employees of procuring entities shall be enacted. It shall address, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements. The code of conduct so enacted shall be promptly made accessible to the public and systematically maintained.

Chapter II. Methods of procurement and their conditions for use; solicitation and notices of the procurement

Section I. Methods of procurement and their conditions for use

Article 27

Methods of procurement[66]

1. The procuring entity may conduct procurement by means of:

(a) Open tendering;

(b) Restricted tendering;

(c) Request for quotations;

[66] States may choose not to incorporate all the methods of procurement listed in this article into their national legislation, although an appropriate range of options, including open tendering, should be always provided for. On this question, see the Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/...). States may consider whether, for certain methods of procurement, to include a requirement for high-level approval by a designated organ. On this question, see the Guide to Enactment.

(d) Request for proposals without negotiation;

(e) Two-stage tendering;

(f) Request for proposals with dialogue;

(g) Request for proposals with consecutive negotiations;

(h) Competitive negotiations;

(i) Electronic reverse auction; and

(j) Single-source procurement.

2. The procuring entity may engage in a framework agreement procedure in accordance with the provisions of chapter VII of this Law.

Article 28

General rules applicable to the selection of a procurement method

1. Except as otherwise provided for in articles 29 to 31 of this Law, a procuring entity shall conduct procurement by means of open tendering.

2. A procuring entity may use a method of procurement other than open tendering only in accordance with articles 29 to 31 of this Law, shall select the other method of procurement to accommodate the circumstances of the procurement concerned and shall seek to maximize competition to the extent practicable.

3. If the procuring entity uses a method of procurement other than open tendering, it shall include in the record required under article 25 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of that method.

Article 29

Conditions for the use of methods of procurement under chapter IV of this Law (restricted tendering, requests for quotations and requests for proposals without negotiation)

1. The procuring entity may engage in procurement by means of restricted tendering in accordance with article 45 of this Law when:

(a) The subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

2. A procuring entity may engage in procurement by means of a request for quotations in accordance with article 46 of this Law for the procurement of readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the threshold amount set out in the procurement regulations.

3. The procuring entity may engage in procurement by means of request for proposals without negotiation in accordance with article 47 of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of the quality and technical aspects of the proposals.

Article 30

Conditions for the use of methods of procurement under chapter V of this Law (two-stage tendering, requests for proposals with dialogue, requests for proposals with consecutive negotiations, competitive negotiations and single-source procurement)

1. A procuring entity may engage in procurement by means of two-stage tendering in accordance with article 48 of this Law where:

(a) The procuring entity assesses that discussions with suppliers or contractors are needed to refine aspects of the description of the subject matter of the procurement and to formulate them with the detail required under article 10 of this Law, and in order to allow the procuring entity to obtain the most satisfactory solution to its procurement needs; or

(b) Open tendering was engaged in but no tenders were presented or the procurement was cancelled by the procuring entity pursuant to paragraph 1 of article 19 of this Law and where, in the judgement of the procuring entity, engaging in new open-tendering proceedings or a procurement method under chapter IV of this Law would be unlikely to result in a procurement contract.

2. [Subject to approval by the [*name of the organ designated by the enacting State to issue the approval*]],[67] a procuring entity may engage in procurement by means of request for proposals with dialogue in accordance with article 49 of this Law where:

(a) It is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement in accordance with article 10 of this Law, and the procuring entity assesses that dialogue with suppliers or contractors is needed to obtain the most satisfactory solution to its procurement needs;

(b) The procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) The procuring entity determines that the selected method is the most appropriate method of procurement for the protection of essential security interests of the State; or

(d) Open tendering was engaged in but no tenders were presented or the procurement was cancelled by the procuring entity pursuant to paragraph 1 of article 19 of this Law and where, in the judgement of the procuring entity, engaging

[67] The enacting State may consider enacting the provisions in brackets if it wishes to subject the use of this procurement method to a measure of ex ante control.

in new open-tendering proceedings or a procurement method under chapter IV of this Law would be unlikely to result in a procurement contract.

3. A procuring entity may engage in procurement by means of request for proposals with consecutive negotiations in accordance with article 50 of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of the quality and technical aspects of the proposals, and it assesses that consecutive negotiations with suppliers or contractors are needed in order to ensure that the financial terms and conditions of the procurement contract are acceptable to the procuring entity.

4. A procuring entity may engage in competitive negotiations, in accordance with the provisions of article 51 of this Law, in the following circumstances:

(a) There is an urgent need for the subject matter of the procurement, and engaging in open-tendering proceedings or any other competitive method of procurement, because of the time involved in using those methods, would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, making it impractical to use open-tendering proceedings or any other competitive method of procurement because of the time involved in using those methods; or

(c) The procuring entity determines that the use of any other competitive method of procurement is not appropriate for the protection of essential security interests of the State.

5. A procuring entity may engage in single-source procurement in accordance with the provisions of article 52 of this Law in the following exceptional circumstances:

(a) The subject matter of the procurement is available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the subject matter of the procurement, such that no reasonable alternative or substitute exists, and the use of any other procurement method would therefore not be possible;

(b) Owing to a catastrophic event, there is an extremely urgent need for the subject matter of the procurement, and engaging in any other method of procurement would be impractical because of the time involved in using those methods;

(c) The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;

(d) The procuring entity determines that the use of any other method of procurement is not appropriate for the protection of essential security interests of the State; or

(e) [Subject to approval by the [*name of the organ designated by the enacting State to issue the approval*] and,] following public notice and adequate opportunity to comment, procurement from a particular supplier or contractor is necessary in order to implement a socio-economic policy of this State, provided that procurement from no other supplier or contractor is capable of promoting that policy.

Article 31

Conditions for use of an electronic reverse auction

1. A procuring entity may engage in procurement by means of an electronic reverse auction in accordance with the provisions of chapter VI of this Law, under the following conditions:

(a) It is feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement;

(b) There is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction, such that effective competition is ensured; and

(c) The criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.

2. A procuring entity may use an electronic reverse auction as a phase preceding the award of the procurement contract in a procurement method, as appropriate under the provisions of this Law. It may also use an electronic reverse auction for award of a procurement contract in a framework agreement procedure with second-stage competition in accordance with the provisions of this Law. An electronic reverse auction under this paragraph may be used only where the conditions of paragraph 1 (c) of this article are satisfied.

Article 32

Conditions for use of a framework agreement procedure

1. A procuring entity may engage in a framework agreement procedure in accordance with chapter VII of this Law where it determines that:

(a) The need for the subject matter of the procurement is expected to arise on an indefinite or repeated basis during a given period of time; or

(b) By virtue of the nature of the subject matter of the procurement, the need for that subject matter may arise on an urgent basis during a given period of time.

2. The procuring entity shall include in the record required under article 25 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of a framework agreement procedure and the type of framework agreement selected.

Section II. Solicitation and notices of the procurement

Article 33

Solicitation in open tendering, two-stage tendering and procurement by means of an electronic reverse auction

1. An invitation to tender in open tendering or two-stage tendering and an invitation to an electronic reverse auction under article 53 of this Law shall be published in the publication identified in the procurement regulations.

2. The invitation shall also be published internationally, so as to be widely accessible to international suppliers or contractors.

3. The provisions of this article shall not apply where the procuring entity engages in pre-qualification proceedings in accordance with article 18 of this Law.

4. The procuring entity shall not be required to cause the invitation to be published in accordance with paragraph 2 of this article in domestic procurement and in procurement proceedings where the procuring entity decides, in view of the low value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in presenting submissions.

Article 34

Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement: requirement for an advance notice of the procurement

1. (a) When the procuring entity engages in procurement by means of restricted tendering on the grounds specified in paragraph 1 (a) of article 29 of this Law, it shall solicit tenders from all suppliers and contractors from which the subject matter of the procurement is available;

(b) When the procuring entity engages in procurement by means of restricted tendering on the grounds specified in paragraph 1 (b) of article 29 of this Law, it shall select suppliers or contractors from which to solicit tenders in a non-discriminatory manner, and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

2. Where the procuring entity engages in procurement by means of request for quotations in accordance with paragraph 2 of article 29 of this Law, it shall request quotations from as many suppliers or contractors as practicable, but from at least three.

3. Where the procuring entity engages in procurement by means of competitive negotiations in accordance with paragraph 4 of article 30 of this Law, it shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

4. Where the procuring entity engages in single-source procurement in accordance with paragraph 5 of article 30 of this Law, it shall solicit a proposal or price quotation from a single supplier or contractor.

5. Prior to direct solicitation in accordance with the provisions of paragraphs 1, 3 and 4 of this article, the procuring entity shall cause a notice of the procurement to be published in the publication identified in the procurement regulations. The notice shall contain at a minimum the following information:

(a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into in the procurement proceedings, including the nature, quantity and place of delivery of the goods to be supplied, the nature and location of the construction to be effected or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods, the completion of the construction or the provision of the services;

(c) A declaration pursuant to article 8 of this Law; and

(d) The method of procurement to be used.

6. The requirements of paragraph 5 of this article shall not apply in cases of urgent need as referred to in paragraphs 4 (a), 4 (b) and 5 (b) of article 30 of this Law.

Article 35

Solicitation in request-for-proposals proceedings

1. An invitation to participate in request-for-proposals proceedings shall be published in accordance with paragraphs 1 and 2 of article 33 of this Law, except where:

(a) The procuring entity engages in pre-qualification proceedings in accordance with article 18 of this Law or in pre-selection proceedings in accordance with paragraph 3 of article 49 of this Law;

(b) The procuring entity engages in direct solicitation under the conditions set out in paragraph 2 of this article; or

(c) The procuring entity decides not to cause the invitation to be published in accordance with paragraph 2 of article 33 of this Law in the circumstances referred to in paragraph 4 of article 33 of this Law.

2. The procuring entity may engage in direct solicitation in request-for-proposals proceedings if:

(a) The subject matter to be procured is available from only a limited number of suppliers or contractors, provided that the procuring entity solicits proposals from all those suppliers or contractors;

(b) The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the subject matter to be procured, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition and selects suppliers or contractors from which to solicit proposals in a non-discriminatory manner; or

(c) The procurement involves classified information, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.

3. The procuring entity shall include in the record required under article 25 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request-for-proposals proceedings.

4. The procuring entity shall cause a notice of the procurement to be published in accordance with the requirements set out in paragraph 5 of article 34 of this Law when it engages in direct solicitation in request-for-proposals proceedings.

Chapter III. Open tendering

Section I. Solicitation of tenders

Article 36

Procedures for soliciting tenders

The procuring entity shall solicit tenders by causing an invitation to tender to be published in accordance with the provisions of article 33 of this Law.

Article 37

Contents of invitation to tender

The invitation to tender shall include the following information:

(a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings, including the nature, quantity and place of delivery of the goods to be supplied, the nature and location of the construction to be effected or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods, the completion of the construction or the provision of the services;

(c) A summary of the criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, and of any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications, in conformity with article 9 of this Law;

(d) A declaration pursuant to article 8 of this Law;

(e) The means of obtaining the solicitation documents and the place where they may be obtained;

(f) The price, if any, to be charged by the procuring entity for the solicitation documents;

(g) If a price is to be charged for the solicitation documents, the means and currency of payment;

(h) The language or languages in which the solicitation documents are available;

(i) The manner, place and deadline for presenting tenders.

Article 38

Provision of solicitation documents

The procuring entity shall provide the solicitation documents to each supplier or contractor that responds to the invitation to tender in accordance with the procedures and requirements specified therein. If pre-qualification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been pre-qualified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of providing them to suppliers or contractors.

Article 39

Contents of solicitation documents

The solicitation documents shall include the following information:

(a) Instructions for preparing tenders;

(b) The criteria and procedures, in conformity with the provisions of article 9 of this Law, that will be applied in the ascertainment of the qualifications of suppliers or contractors and in any further demonstration of qualifications pursuant to paragraph 5 of article 43 of this Law;

(c) The requirements as to documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;

(d) A detailed description of the subject matter of the procurement, in conformity with article 10 of this Law; the quantity of the goods; the services to be performed; the location where the goods are to be delivered, construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;

(e) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the form of the contract, if any, to be signed by the parties;

(f) If alternatives to the characteristics of the subject matter of the procurement, the contractual terms and conditions or other requirements set out in the solicitation documents are permitted, a statement to that effect and a description of the manner in which alternative tenders are to be evaluated;

(g) If suppliers or contractors are permitted to present tenders for only a portion of the subject matter of the procurement, a description of the portion or portions for which tenders may be presented;

(h) The manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost

of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(i) The currency or currencies in which the tender price is to be formulated and expressed;

(j) The language or languages, in conformity with article 13 of this Law, in which tenders are to be prepared;

(k) Any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors presenting tenders in accordance with article 17 of this Law, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and material bonds;

(l) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security, a statement to that effect;

(m) The manner, place and deadline for presenting tenders, in conformity with article 14 of this Law;

(n) The means by which, pursuant to article 15 of this Law, suppliers or contractors may seek clarification of the solicitation documents and a statement as to whether the procuring entity intends to convene a meeting of suppliers or contractors at this stage;

(o) The period of time during which tenders shall be in effect, in conformity with article 41 of this Law;

(p) The manner, place, date and time for the opening of tenders, in conformity with article 42 of this Law;

(q) The criteria and procedure for examining tenders against the description of the subject matter of the procurement;

(r) The criteria and procedure for evaluating tenders in accordance with article 11 of this Law;

(s) The currency that will be used for the purpose of evaluating tenders pursuant to paragraph 4 of article 43 of this Law and either the exchange rate that will be used for the conversion of tender prices into that currency or a statement that the rate published by a specified financial institution and prevailing on a specified date will be used;

(t) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where those laws and regulations may be found;

(u) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings without the intervention of an intermediary;

(v) Notice of the right provided under article 64 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and the reasons therefor;

(w) Any formalities that will be required, once a successful tender has been accepted, for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract and approval by another authority pursuant to article 22 of this Law, and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(x) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of tenders and to other aspects of the procurement proceedings.

Section II. Presentation of tenders

Article 40

Presentation of tenders

1. Tenders shall be presented in the manner, at the place and by the deadline specified in the solicitation documents.

2. (a) A tender shall be presented in writing, signed and:

(i) If in paper form, in a sealed envelope; or

(ii) If in any other form, according to the requirements specified by the procuring entity in the solicitation documents, which shall ensure at least a similar degree of authenticity, security, integrity and confidentiality;

(b) The procuring entity shall provide to the supplier or contractor a receipt showing the date and time when its tender was received;

(c) The procuring entity shall preserve the security, integrity and confidentiality of a tender and shall ensure that the content of the tender is examined only after it is opened in accordance with this Law.

3. A tender received by the procuring entity after the deadline for presenting tenders shall not be opened and shall be returned unopened to the supplier or contractor that presented it.

Article 41

Period of effectiveness of tenders; modification and withdrawal of tenders

1. Tenders shall be in effect during the period of time specified in the solicitation documents.

2. (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A supplier or contractor may refuse the request without forfeiting its tender security;

(b) Suppliers or contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

3. Unless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for presenting tenders.

Section III. Evaluation of tenders

Article 42

Opening of tenders

1. Tenders shall be opened at the time specified in the solicitation documents as the deadline for presenting tenders. They shall be opened at the place and in accordance with the manner and procedures specified in the solicitation documents.

2. All suppliers or contractors that have presented tenders, or their representatives, shall be permitted by the procuring entity to participate in the opening of tenders.

3. The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have presented tenders but that are not present or represented at the opening of tenders, and included immediately in the record of the procurement proceedings required by article 25 of this Law.

Article 43

Examination and evaluation of tenders

1. (a) Subject to subparagraph (b) of this paragraph, the procuring entity shall regard a tender as responsive if it conforms to all requirements set out in the solicitation documents in accordance with article 10 of this Law;

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

2. The procuring entity shall reject a tender:

(a) If the supplier or contractor that presented the tender is not qualified;

(b) If the supplier or contractor that presented the tender does not accept a correction of an arithmetical error made pursuant to article 16 of this Law;

(c) If the tender is not responsive;

(d) In the circumstances referred to in article 20 or 21 of this Law.

3. (a) The procuring entity shall evaluate the tenders that have not been rejected in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the criteria and procedures set out in the solicitation documents. No criterion or procedure shall be used that has not been set out in the solicitation documents;

(b) The successful tender shall be:

(i) Where price is the only award criterion, the tender with the lowest tender price; or

(ii) Where there are price and other award criteria, the most advantageous tender ascertained on the basis of the criteria and procedures for evaluating tenders specified in the solicitation documents in accordance with article 11 of this Law.

4. When tender prices are expressed in two or more currencies, for the purpose of evaluating and comparing tenders, the tender prices of all tenders shall be converted to the currency specified in the solicitation documents according to the rate set out in those documents, pursuant to subparagraph (s) of article 39 of this Law.

5. Whether or not it has engaged in pre-qualification proceedings pursuant to article 18 of this Law, the procuring entity may require the supplier or contractor presenting the tender that has been found to be the successful tender pursuant to paragraph 3 (b) of this article to demonstrate its qualifications again, in accordance with criteria and procedures conforming to the provisions of article 9 of this Law. The criteria and procedures to be used for such further demonstration shall be set out in the solicitation documents. Where pre-qualification proceedings have been engaged in, the criteria shall be the same as those used in the pre-qualification proceedings.

6. If the supplier or contractor presenting the successful tender is requested to demonstrate its qualifications again in accordance with paragraph 5 of this article but fails to do so, the procuring entity shall reject that tender and shall select the next successful tender from among those remaining in effect, in accordance with paragraph 3 of this article, subject to the right of the procuring entity to cancel the procurement in accordance with paragraph 1 of article 19 of this Law.

Article 44

Prohibition of negotiations with suppliers or contractors

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender presented by the supplier or contractor.

Chapter IV. Procedures for restricted tendering, requests for quotations and requests for proposals without negotiation

Article 45

Restricted tendering

1. The procuring entity shall solicit tenders in accordance with the provisions of paragraphs 1 and 5 of article 34 of this Law.

2. The provisions of chapter III of this Law, except for articles 36 to 38, shall apply to restricted-tendering proceedings.

Article 46

Request for quotations

1. The procuring entity shall request quotations in accordance with the provisions of paragraph 2 of article 34 of this Law. Each supplier or contractor from which a quotation is requested shall be informed whether any elements other than the charges for the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.

2. Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation presented by the supplier or contractor.

3. The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity as set out in the request for quotations.

Article 47

Request for proposals without negotiation

1. The procuring entity shall solicit proposals by causing an invitation to participate in the request-for-proposals-without-negotiation proceedings to be published in accordance with paragraph 1 of article 35 of this Law, unless an exception provided for in that article applies.

2. The invitation shall include:

(a) The name and address of the procuring entity;

(b) A detailed description of the subject matter of the procurement, in conformity with article 10 of this Law, and the desired or required time and location for the provision of such subject matter;

(c) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the form of the contract, if any, to be signed by the parties;

(d) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that

must be presented by suppliers or contractors to demonstrate their qualifications, in conformity with article 9 of this Law;

(e) The criteria and procedures for opening the proposals and for examining and evaluating the proposals in accordance with articles 10 and 11 of this Law, including the minimum requirements with respect to technical, quality and performance characteristics that proposals must meet in order to be considered responsive in accordance with article 10 of this Law, and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;

(f) A declaration pursuant to article 8 of this Law;

(g) The means of obtaining the request for proposals and the place where it may be obtained;

(h) The price, if any, to be charged by the procuring entity for the request for proposals;

(i) If a price is to be charged for the request for proposals, the means and currency of payment;

(j) The language or languages in which the request for proposals is available;

(k) The manner, place and deadline for presenting proposals.

3. The procuring entity shall issue the request for proposals:

(a) Where an invitation to participate in the request-for-proposals-without-negotiation proceedings has been published in accordance with the provisions of paragraph 1 of article 35 of this Law, to each supplier or contractor responding to the invitation in accordance with the procedures and requirements specified therein;

(b) In the case of pre-qualification, to each supplier or contractor pre-qualified in accordance with article 18 of this Law;

(c) In the case of direct solicitation under paragraph 2 of article 35 of this Law, to each supplier or contractor selected by the procuring entity;

that pays the price, if any, charged for the request for proposals. The price that the procuring entity may charge for the request for proposals shall reflect only the cost of providing it to suppliers or contractors.

4. The request for proposals shall include, in addition to the information referred to in subparagraphs (a) to (e) and (k) of paragraph 2 of this article, the following information:

(a) Instructions for preparing and presenting proposals, including instructions to suppliers or contractors to present simultaneously to the procuring entity proposals in two envelopes: one envelope containing the technical, quality and performance characteristics of the proposal, and the other envelope containing the financial aspects of the proposal;

(b) If suppliers or contractors are permitted to present proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be presented;

(c) The currency or currencies in which the proposal price is to be formulated and expressed, the currency that will be used for the purpose of evaluating proposals and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution and prevailing on a specified date will be used;

(d) The manner in which the proposal price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(e) The means by which, pursuant to article 15 of this Law, suppliers or contractors may seek clarification of the request for proposals, and a statement as to whether the procuring entity intends to convene a meeting of suppliers or contractors at this stage;

(f) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where those laws and regulations may be found;

(g) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings without the intervention of an intermediary;

(h) Notice of the right provided under article 64 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and the reasons therefor;

(i) Any formalities that will be required, once the successful proposal has been accepted, for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract and approval by another authority pursuant to article 22 of this Law, and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(j) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of proposals and to the procurement proceedings.

5. Before opening the envelopes containing the financial aspects of the proposals, the procuring entity shall examine and evaluate the technical, quality and performance characteristics of proposals in accordance with the criteria and procedures specified in the request for proposals.

6. The results of the examination and evaluation of the technical, quality and performance characteristics of the proposals shall immediately be included in the record of the procurement proceedings.

7. The proposals whose technical, quality and performance characteristics fail to meet the relevant minimum requirements shall be considered to be non-responsive

and shall be rejected on that ground. A notice of rejection and the reasons for the rejection, together with the unopened envelope containing the financial aspects of the proposal, shall promptly be dispatched to each respective supplier or contractor whose proposal was rejected.

8. The proposals whose technical, quality and performance characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive. The procuring entity shall promptly communicate to each supplier or contractor presenting such a proposal the score of the technical, quality and performance characteristics of its respective proposal. The procuring entity shall invite all such suppliers or contractors to the opening of the envelopes containing the financial aspects of their proposals.

9. The score of the technical, quality and performance characteristics of each responsive proposal and the corresponding financial aspect of that proposal shall be read out in the presence of the suppliers or contractors invited, in accordance with paragraph 8 of this article, to the opening of the envelopes containing the financial aspects of the proposals.

10. The procuring entity shall compare the financial aspects of the responsive proposals and on that basis identify the successful proposal in accordance with the criteria and the procedure set out in the request for proposals. The successful proposal shall be the proposal with the best combined evaluation in terms of: (a) the criteria other than price specified in the request for proposals; and (b) the price.

Chapter V. Procedures for two-stage tendering, requests for proposals with dialogue, requests for proposals with consecutive negotiations, competitive negotiations and single-source procurement

Article 48

Two-stage tendering

1. The provisions of chapter III of this Law shall apply to two-stage-tendering proceedings, except to the extent that those provisions are derogated from in this article.

2. The solicitation documents shall call upon suppliers or contractors to present, in the first stage of two-stage-tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or performance characteristics of the subject matter of the procurement, as well as to contractual terms and conditions of supply and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

3. The procuring entity may, in the first stage, engage in discussions with suppliers or contractors whose initial tenders have not been rejected pursuant to provisions of this Law concerning any aspect of their initial tenders. When the procuring entity engages in discussions with any supplier or contractor, it shall extend an equal opportunity to participate in discussions to all suppliers or contractors.

4. (a) In the second stage of two-stage-tendering proceedings, the procuring entity shall invite all suppliers or contractors whose initial tenders were not rejected in the first stage to present final tenders with prices in response to a revised set of terms and conditions of the procurement;

(b) In revising the relevant terms and conditions of the procurement, the procuring entity may not modify the subject matter of the procurement but may refine aspects of the description of the subject matter of the procurement by:

(i) Deleting or modifying any aspect of the technical, quality or performance characteristics of the subject matter of the procurement initially provided and adding any new characteristics that conform to the requirements of this Law;

(ii) Deleting or modifying any criterion for examining or evaluating tenders initially provided and adding any new criterion that conforms to the requirements of this Law, only to the extent that the deletion, modification or addition is required as a result of changes made in the technical, quality or performance characteristics of the subject matter of the procurement;

(c) Any deletion, modification or addition made pursuant to subparagraph (b) of this paragraph shall be communicated to suppliers or contractors in the invitation to present final tenders;

(d) A supplier or contractor not wishing to present a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide;

(e) The final tenders shall be evaluated in order to ascertain the successful tender as defined in paragraph 3 (b) of article 43 of this Law.

Article 49

Request for proposals with dialogue

1. The procuring entity shall solicit proposals by causing an invitation to participate in the request-for-proposals-with-dialogue proceedings to be published in accordance with paragraph 1 of article 35 of this Law, unless an exception provided for in that article applies.

2. The invitation shall include:

(a) The name and address of the procuring entity;

(b) A description of the subject matter of the procurement, to the extent known, and the desired or required time and location for the provision of such subject matter;

(c) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the form of the contract, if any, to be signed by the parties;

(d) The intended stages of the procedure;

(e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that

must be presented by suppliers or contractors to demonstrate their qualifications, in conformity with article 9 of this Law;

(f) The minimum requirements that proposals must meet in order to be considered responsive in accordance with article 10 of this Law and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;

(g) A declaration pursuant to article 8 of this Law;

(h) The means of obtaining the request for proposals and the place where it may be obtained;

(i) The price, if any, to be charged by the procuring entity for the request for proposals;

(j) If a price is to be charged for the request for proposals, the means and currency of payment;

(k) The language or languages in which the request for proposals is available;

(l) The manner, place and deadline for presenting proposals.

3. For the purpose of limiting the number of suppliers or contractors from which to request proposals, the procuring entity may engage in pre-selection proceedings. The provisions of article 18 of this Law shall apply mutatis mutandis to the pre-selection proceedings, except to the extent that those provisions are derogated from in this paragraph:

(a) The procuring entity shall specify in the pre-selection documents that it will request proposals from only a limited number of pre-selected suppliers or contractors that best meet the qualification criteria specified in the pre-selection documents;

(b) The pre-selection documents shall set out the maximum number of pre-selected suppliers or contractors from which the proposals will be requested and the manner in which the selection of that number will be carried out. In establishing such a limit, the procuring entity shall bear in mind the need to ensure effective competition;

(c) The procuring entity shall rate the suppliers or contractors that meet the criteria specified in the pre-selection documents according to the manner of rating that is set out in the invitation to pre-selection and the pre-selection documents;

(d) The procuring entity shall pre-select suppliers or contractors that acquired the best rating, up to the maximum number indicated in the pre-selection documents but at least three, if possible;

(e) The procuring entity shall promptly notify each supplier or contractor whether it has been pre-selected and shall, upon request, communicate to suppliers or contractors that have not been pre-selected the reasons therefor. It shall make available to any person, upon request, the names of all suppliers or contractors that have been pre-selected.

4. The procuring entity shall issue the request for proposals:

(a) Where an invitation to participate in the request-for-proposals-with-dialogue proceedings has been published in accordance with the provisions of paragraph 1 of article 35 of this Law, to each supplier or contractor responding to the invitation in accordance with the procedures and requirements specified therein;

(b) In the case of pre-qualification, to each supplier or contractor pre-qualified in accordance with article 18 of this Law;

(c) Where pre-selection proceedings have been engaged in, to each pre-selected supplier or contractor in accordance with the procedures and requirements specified in the pre-selection documents;

(d) In the case of direct solicitation under paragraph 2 of article 35 of this Law, to each supplier or contractor selected by the procuring entity;

that pays the price, if any, charged for the request for proposals. The price that the procuring entity may charge for the request for proposals shall reflect only the cost of providing it to suppliers or contractors.

5. The request for proposals shall include, in addition to the information referred to in paragraphs 2 (a) to (f) and (l) of this article, the following information:

(a) Instructions for preparing and presenting proposals;

(b) If suppliers or contractors are permitted to present proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be presented;

(c) The currency or currencies in which the proposal price is to be formulated and expressed, the currency that will be used for the purpose of evaluating proposals and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution and prevailing on a specified date will be used;

(d) The manner in which the proposal price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(e) The means by which, pursuant to article 15 of this Law, suppliers or contractors may seek clarification of the request for proposals and a statement as to whether the procuring entity intends to convene a meeting of suppliers or contractors at this stage;

(f) Any element of the description of the subject matter of the procurement or term or condition of the procurement contract that will not be the subject of dialogue during the procedure;

(g) Where the procuring entity intends to limit the number of suppliers or contractors that it will invite to participate in the dialogue, the minimum number of suppliers or contractors, which shall be not lower than three, if possible, and, where appropriate, the maximum number of suppliers or contractors and the criteria and

procedure, in conformity with the provisions of this Law, that will be followed in selecting either number;

(h) The criteria and procedure for evaluating the proposals in accordance with article 11 of this Law;

(i) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where those laws and regulations may be found;

(j) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings without the intervention of an intermediary;

(k) Notice of the right provided under article 64 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and the reasons therefor;

(l) Any formalities that will be required, once the successful offer has been accepted, for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract and approval by another authority pursuant to article 22 of this Law, and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;

(m) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of proposals and to the procurement proceedings.

6. (a) The procuring entity shall examine all proposals received against the established minimum requirements and shall reject each proposal that fails to meet these minimum requirements on the ground that it is non-responsive;

(b) Where a maximum limit on the number of suppliers or contractors that can be invited to participate in the dialogue has been established and the number of responsive proposals exceeds that limit, the procuring entity shall select the maximum number of responsive proposals in accordance with the criteria and procedure specified in the request for proposals;

(c) A notice of rejection and the reasons for the rejection shall be promptly dispatched to each respective supplier or contractor whose proposal was rejected.

7. The procuring entity shall invite each supplier or contractor that presented a responsive proposal, within any applicable maximum, to participate in the dialogue. The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the dialogue, which shall be at least three, if possible, is sufficient to ensure effective competition.

8. The dialogue shall be conducted by the same representatives of the procuring entity on a concurrent basis.

9. During the course of the dialogue, the procuring entity shall not modify the subject matter of the procurement, any qualification or evaluation criterion, any minimum requirements established pursuant to paragraph 2 (f) of this article, any element of the description of the subject matter of the procurement or any term or condition of the procurement contract that is not subject to the dialogue as specified in the request for proposals.

10. Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that is communicated by the procuring entity to a supplier or contractor shall be communicated at the same time and on an equal basis to all other participating suppliers or contractors, unless such information is specific or exclusive to that supplier or contractor or such communication would be in breach of the confidentiality provisions of article 24 of this Law.

11. Following the dialogue, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present a best and final offer with respect to all aspects of their proposals. The request shall be in writing and shall specify the manner, place and deadline for presenting best and final offers.

12. No negotiations shall take place between the procuring entity and suppliers or contractors with respect to their best and final offers.

13. The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals.

Article 50

Request for proposals with consecutive negotiations

1. The provisions of paragraphs 1 to 7 of article 47 of this Law shall apply mutatis mutandis to procurement conducted by means of request for proposals with consecutive negotiations, except to the extent that those provisions are derogated from in this article.

2. Proposals whose technical, quality and performance characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive. The procuring entity shall rank each responsive proposal in accordance with the criteria and procedure for evaluating proposals as set out in the request for proposals and shall:

(a) Promptly communicate to each supplier or contractor presenting a responsive proposal the score of the technical, quality and performance characteristics of its respective proposal and its ranking;

(b) Invite the supplier or contractor that has attained the best ranking, in accordance with those criteria and procedure, for negotiations on the financial aspects of its proposal; and

(c) Inform other suppliers or contractors that presented responsive proposals that their proposals may be considered for negotiation if negotiations with the supplier (or suppliers) or contractor (or contractors) with a better ranking do not result in a procurement contract.

3. If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph 2 (b) of this article will not result in a procurement contract, the procuring entity shall inform that supplier or contractor that it is terminating the negotiations.

4. The procuring entity shall then invite for negotiations the supplier or contractor that attained the second-best ranking; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors still participating in the procurement proceedings for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

5. During the course of the negotiations, the procuring entity shall not modify the subject matter of the procurement; any qualification, examination or evaluation criterion, including any established minimum requirements; any element of the description of the subject matter of the procurement; or term or condition of the procurement contract other than financial aspects of proposals that are subject to the negotiations as specified in the request for proposals.

6. The procuring entity may not reopen negotiations with any supplier or contractor with which it has terminated negotiations.

Article 51

Competitive negotiations

1. Paragraphs 3, 5 and 6 of article 34 of this Law shall apply to the procedure preceding the negotiations.

2. Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that is communicated by the procuring entity to a supplier or contractor before or during the negotiations shall be communicated at the same time and on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement, unless such information is specific or exclusive to that supplier or contractor or such communication would be in breach of the confidentiality provisions of article 24 of this Law.

3. Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present, by a specified date, a best and final offer with respect to all aspects of their proposals.

4. No negotiations shall take place between the procuring entity and suppliers or contractors with respect to their best and final offers.

5. The successful offer shall be the offer that best meets the needs of the procuring entity.

Article 52

Single-source procurement

Paragraphs 4 to 6 of article 34 of this Law shall apply to the procedure preceding the solicitation of a proposal or price quotation from a single supplier or contractor. The procuring entity shall engage in negotiations with the supplier or contractor

from which a proposal or price quotation is solicited unless such negotiations are not feasible in the circumstances of the procurement concerned.

Chapter VI. Electronic reverse auctions

Article 53

Electronic reverse auction as a stand-alone method of procurement

1. The procuring entity shall solicit bids by causing an invitation to the electronic reverse auction to be published in accordance with article 33 of this Law. The invitation shall include:

(a) The name and address of the procuring entity;

(b) A detailed description of the subject matter of the procurement, in conformity with article 10 of this Law, and the desired or required time and location for the provision of such subject matter;

(c) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the form of the contract, if any, to be signed by the parties;

(d) A declaration pursuant to article 8 of this Law;

(e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications in conformity with article 9 of this Law;

(f) The criteria and procedure for examining bids against the description of the subject matter of the procurement;

(g) The criteria and procedure for evaluating bids in accordance with article 11 of this Law, including any mathematical formula that will be used in the evaluation procedure during the auction;

(h) The manner in which the bid price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(i) The currency or currencies in which the bid price is to be formulated and expressed;

(j) The minimum number of suppliers or contractors required to register for the auction in order for the auction to be held, which shall be sufficient to ensure effective competition;

[(k) If any limit on the number of suppliers or contractors that can be registered for the auction is imposed in accordance with paragraph 2 of this article, the relevant maximum number and the criteria and procedure, in conformity with paragraph 2 of this article, that will be followed in selecting it;]

(l) How the auction can be accessed, including appropriate information regarding connection to the auction;

(m) The deadline by which suppliers or contractors must register for the auction and the requirements for registration;

(n) The date and time of the opening of the auction and the requirements for identification of bidders at the opening of the auction;

(o) The criteria governing the closing of the auction;

(p) Other rules for the conduct of the auction, including the information that will be made available to the bidders in the course of the auction, the language in which it will be made available and the conditions under which the bidders will be able to bid;

(q) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where those laws and regulations may be found;

(r) The means by which suppliers or contractors may seek clarification of information relating to the procurement proceedings;

(s) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings before and after the auction without the intervention of an intermediary;

(t) Notice of the right provided under article 64 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and the reasons therefor;

(u) Any formalities that will be required after the auction for a procurement contract to enter into force, including, where applicable, ascertainment of qualifications or responsiveness in accordance with article 57 of this Law and the execution of a written procurement contract pursuant to article 22 of this Law;

(v) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the procurement proceedings.

[2. The procuring entity may impose a maximum limit on the number of suppliers or contractors that can be registered for the electronic reverse auction only to the extent that capacity constraints in its communications system so require, and shall select the suppliers or contractors to be so registered in a non-discriminatory manner. The procuring entity shall include a statement of the reasons and circumstances upon which it relied to justify the imposition of such a maximum limit in the record required under article 25 of this Law.]

3. The procuring entity may decide, in the light of the circumstances of the given procurement, that the electronic reverse auction shall be preceded by an examination or evaluation of initial bids. In such case, the invitation to the auction shall, in addition to information listed in paragraph 1 of this article, include:

(a) An invitation to present initial bids, together with instructions for preparing initial bids;

(b) The manner, place and deadline for presenting initial bids.

4. Where the electronic reverse auction has been preceded by an examination or evaluation of initial bids, the procuring entity shall promptly after the completion of the examination or evaluation of initial bids:

(a) Dispatch the notice of rejection and reasons for rejection to each supplier or contractor whose initial bid was rejected;

(b) Issue an invitation to the auction to each qualified supplier or contractor whose initial bid is responsive, providing all information required to participate in the auction;

(c) Where an evaluation of initial bids has taken place, each invitation to the auction shall also be accompanied by the outcome of the evaluation, as relevant to the supplier or contractor to which the invitation is addressed.

Article 54

Electronic reverse auction as a phase preceding the award of the procurement contract

1. Where an electronic reverse auction is to be used as a phase preceding the award of the procurement contract in a procurement method, as appropriate, or in a framework agreement procedure with second-stage competition, the procuring entity shall notify suppliers or contractors when first soliciting their participation in the procurement proceedings that an auction will be held, and shall provide, in addition to other information required to be included under provisions of this Law, the following information about the auction:

(a) The mathematical formula that will be used in the evaluation procedure during the auction;

(b) How the auction can be accessed, including appropriate information regarding connection to the auction.

2. Before the electronic reverse auction is held, the procuring entity shall issue an invitation to the auction to all suppliers or contractors remaining in the proceedings, specifying:

(a) The deadline by which the suppliers or contractors must register for the auction and requirements for registration;

(b) The date and time of the opening of the auction and requirements for the identification of bidders at the opening of the auction;

(c) Criteria governing the closing of the auction;

(d) Other rules for the conduct of the auction, including the information that will be made available to the bidders during the auction and the conditions under which the bidders will be able to bid.

3. Where an evaluation of initial bids has taken place, each invitation to the auction shall also be accompanied by the outcome of the evaluation as relevant to the supplier or contractor to which the invitation is addressed.

Article 55

Registration for the electronic reverse auction and the timing of the holding of the auction

1. Confirmation of registration for the electronic reverse auction shall be communicated promptly to each registered supplier or contractor.

2. If the number of suppliers or contractors registered for the electronic reverse auction is insufficient to ensure effective competition, the procuring entity may cancel the auction. The cancellation of the auction shall be communicated promptly to each registered supplier or contractor.

3. The period of time between the issuance of the invitation to the electronic reverse auction and the auction shall be sufficiently long to allow suppliers or contractors to prepare for the auction, taking into account the reasonable needs of the procuring entity.

Article 56

Requirements during the electronic reverse auction

1. The electronic reverse auction shall be based on:

(a) Price, where the procurement contract is to be awarded to the lowest-priced bid; or

(b) Price and other criteria specified to suppliers or contractors under articles 53 and 54 of this Law, as applicable, where the procurement contract is to be awarded to the most advantageous bid.

2. During the auction:

(a) All bidders shall have an equal and continuous opportunity to present their bids;

(b) There shall be automatic evaluation of all bids in accordance with the criteria, procedure and formula provided to suppliers or contractors under articles 53 and 54 of this Law, as applicable;

(c) Each bidder must receive, instantaneously and on a continuous basis during the auction, sufficient information allowing it to determine the standing of its bid vis-à-vis other bids;

(d) There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in subparagraphs (a) and (c) of this paragraph.

3. The procuring entity shall not disclose the identity of any bidder during the auction.

4. The auction shall be closed in accordance with the criteria specified to suppliers or contractors under articles 53 and 54 of this Law, as applicable.

5. The procuring entity shall suspend or terminate the auction in the case of failures in its communication system that put at risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the auction. The procuring entity shall not disclose the identity of any bidder in the case of suspension or termination of the auction.

Article 57

Requirements after the electronic reverse auction

1. The bid that at the closure of the electronic reverse auction is the lowest-priced bid or the most advantageous bid, as applicable, shall be the successful bid.

2. In procurement by means of an auction that was not preceded by examination or evaluation of initial bids, the procuring entity shall ascertain after the auction the responsiveness of the successful bid and the qualifications of the supplier or contractor submitting it. The procuring entity shall reject that bid if it is found to be unresponsive or if the supplier or contractor submitting it is found unqualified. Without prejudice to the right of the procuring entity to cancel the procurement in accordance with paragraph 1 of article 19 of this Law, the procuring entity shall select the bid that was the next lowest-priced or next most advantageous bid at the closure of the auction, provided that that bid is ascertained to be responsive and the supplier or contractor submitting it is ascertained to be qualified.

3. Where the successful bid at the closure of the auction appears to the procuring entity to be abnormally low and gives rise to concerns on the part of the procuring entity as to the ability of the bidder that presented it to perform the procurement contract, the procuring entity may follow the procedures described in article 20 of this Law. If the procuring entity rejects the bid as abnormally low under article 20, it shall select the bid that at the closure of the auction was the next lowest-priced or next most advantageous bid. This provision is without prejudice to the right of the procuring entity to cancel the procurement in accordance with paragraph 1 of article 19 of this Law.

Chapter VII. Framework agreement procedures

Article 58

Award of a closed framework agreement

1. The procuring entity shall award a closed framework agreement:

(a) By means of open-tendering proceedings, in accordance with provisions of chapter III of this Law, except to the extent that those provisions are derogated from in this chapter; or

(b) By means of other procurement methods, in accordance with the relevant provisions of chapters II, IV and V of this Law, except to the extent that those provisions are derogated from in this chapter.

2. The provisions of this Law regulating pre-qualification and the contents of the solicitation in the context of the procurement methods referred to in paragraph 1 of this article shall apply mutatis mutandis to the information to be provided to

suppliers or contractors when first soliciting their participation in a closed framework agreement procedure. The procuring entity shall in addition specify at that stage:

(a) That the procurement will be conducted as a framework agreement procedure, leading to a closed framework agreement;

(b) Whether the framework agreement is to be concluded with one or more than one supplier or contractor;

(c) If the framework agreement will be concluded with more than one supplier or contractor, any minimum or maximum limit on the number of suppliers or contractors that will be parties thereto;

(d) The form, terms and conditions of the framework agreement in accordance with article 59 of this Law.

3. The provisions of article 22 of this Law shall apply mutatis mutandis to the award of a closed framework agreement.

Article 59

Requirements for closed framework agreements

1. A closed framework agreement shall be concluded in writing and shall set out:

(a) The duration of the framework agreement, which shall not exceed the maximum duration established by the procurement regulations;

(b) The description of the subject matter of the procurement and all other terms and conditions of the procurement established when the framework agreement is concluded;

(c) To the extent that they are known, estimates of the terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded;

(d) Whether, in a closed framework agreement concluded with more than one supplier or contractor, there will be a second-stage competition to award a procurement contract under the framework agreement and, if so:

(i) A statement of the terms and conditions of the procurement that are to be established or refined through second-stage competition;

(ii) The procedures for and the anticipated frequency of any second-stage competition, and envisaged deadlines for presenting second-stage submissions;

(iii) The procedures and criteria to be applied during the second-stage competition, including the relative weight of such criteria and the manner in which they will be applied, in accordance with articles 10 and 11 of this Law. If the relative weights of the evaluation criteria may be varied during the second-stage competition, the framework agreement shall specify the permissible range;

(e) Whether the award of a procurement contract under the framework agreement will be to the lowest-priced or to the most advantageous submission; and

(f) The manner in which the procurement contract will be awarded.

2. A closed framework agreement with more than one supplier or contractor shall be concluded as one agreement between all parties unless:

(a) The procuring entity determines that it is in the interests of a party to the framework agreement that a separate agreement with any supplier or contractor party be concluded;

(b) The procuring entity includes in the record required under article 25 of this Law a statement of the reasons and circumstances on which it relied to justify the conclusion of separate agreements; and

(c) Any variation in the terms and conditions of the separate agreements for a given procurement is minor and concerns only those provisions that justify the conclusion of separate agreements.

3. The framework agreement shall contain, in addition to information specified elsewhere in this article, all information necessary to allow the effective operation of the framework agreement, including information on how the agreement and notifications of forthcoming procurement contracts thereunder can be accessed and appropriate information regarding connection, where applicable.

Article 60

Establishment of an open framework agreement

1. The procuring entity shall establish and maintain an open framework agreement online.

2. The procuring entity shall solicit participation in the open framework agreement by causing an invitation to become a party to the open framework agreement to be published following the requirements of article 33 of this Law.

3. The invitation to become a party to the open framework agreement shall include the following information:

(a) The name and address of the procuring entity establishing and maintaining the open framework agreement and the name and address of any other procuring entities that will have the right to award procurement contracts under the framework agreement;

(b) That the procurement will be conducted as a framework agreement procedure leading to an open framework agreement;

(c) The language (or languages) of the open framework agreement and all information about the operation of the agreement, including how the agreement and notifications of forthcoming procurement contracts thereunder can be accessed and appropriate information regarding connection;

(d) The terms and conditions for suppliers or contractors to be admitted to the open framework agreement, including:

(i) A declaration pursuant to article 8 of this Law;

[(ii) If any maximum limit on the number of suppliers or contractors that are parties to the open framework agreement is imposed in accordance with paragraph 7 of this article, the relevant number and the criteria and procedure,

in conformity with paragraph 7 of this article, that will be followed in selecting it;]

(iii) Instructions for preparing and presenting the indicative submissions necessary to become a party to the open framework agreement, including the currency or currencies and the language (or languages) to be used, as well as the criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications in conformity with article 9 of this Law;

(iv) An explicit statement that suppliers or contractors may apply to become parties to the framework agreement at any time during the period of its operation by presenting indicative submissions, subject to any maximum limit on the number of suppliers or contractors and any declaration made pursuant to article 8 of this Law;

(e) Other terms and conditions of the open framework agreement, including all information required to be set out in the open framework agreement in accordance with article 61 of this Law;

(f) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where those laws and regulations may be found;

(g) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings without the intervention of an intermediary.

4. Suppliers or contractors may apply to become a party or parties to the framework agreement at any time during its operation by presenting indicative submissions to the procuring entity in compliance with the requirements of the invitation to become a party to the open framework agreement.

5. The procuring entity shall examine all indicative submissions received during the period of operation of the framework agreement within a maximum of ... working days [*the enacting State specifies the maximum period of time*], in accordance with the procedures set out in the invitation to become a party to the open framework agreement.

6. The framework agreement shall be concluded with all qualified suppliers or contractors that presented submissions unless their submissions have been rejected on the grounds specified in the invitation to become a party to the open framework agreement.

[7. The procuring entity may impose a maximum limit on the number of parties to the open framework agreement only to the extent that capacity limitations in its communications system so require, and shall select the suppliers or contractors to be parties to the open framework agreement in a non-discriminatory manner. The procuring entity shall include in the record required under article 25 of this Law a statement of the reasons and circumstances upon which it relied to justify the imposition of such a maximum limit.]

8. The procuring entity shall promptly notify the suppliers or contractors whether they have become parties to the framework agreement and of the reasons for the rejection of their indicative submissions if they have not.

Article 61

Requirements for open framework agreements

1. An open framework agreement shall provide for second-stage competition for the award of a procurement contract under the agreement and shall include:

(a) The duration of the framework agreement;

(b) The description of the subject matter of the procurement and all other terms and conditions of the procurement known when the open framework agreement is established;

(c) Any terms and conditions of the procurement that may be refined through second-stage competition;

(d) The procedures and the anticipated frequency of second-stage competition;

(e) Whether the award of procurement contracts under the framework agreement will be to the lowest-priced or the most advantageous submission;

(f) The procedures and criteria to be applied during the second-stage competition, including the relative weight of the evaluation criteria and the manner in which they will be applied, in accordance with articles 10 and 11 of this Law. If the relative weights of the evaluation criteria may be varied during second-stage competition, the framework agreement shall specify the permissible range.

2. The procuring entity shall, during the entire period of operation of the open framework agreement, republish at least annually the invitation to become a party to the open framework agreement and shall in addition ensure unrestricted, direct and full access to the terms and conditions of the framework agreement and to any other necessary information relevant to its operation.

Article 62

Second stage of a framework agreement procedure

1. Any procurement contract under a framework agreement shall be awarded in accordance with the terms and conditions of the framework agreement and the provisions of this article.

2. A procurement contract under a framework agreement may be awarded only to a supplier or contractor that is a party to the framework agreement.

3. The provisions of article 22 of this Law, except for paragraph 2, shall apply to the acceptance of the successful submission under a framework agreement without second-stage competition.

4. In a closed framework agreement with second-stage competition and in an open framework agreement, the following procedures shall apply to the award of a procurement contract:

(a) The procuring entity shall issue a written invitation to present submissions, simultaneously to:

(i) Each supplier or contractor party to the framework agreement; or

(ii) Only to those suppliers or contractors parties to the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement, provided that at the same time notice of the second-stage competition is given to all parties to the framework agreement so that they have the opportunity to participate in the second-stage competition;

(b) The invitation to present submissions shall include the following information:

(i) A restatement of the existing terms and conditions of the framework agreement to be included in the anticipated procurement contract, a statement of the terms and conditions of the procurement that are to be subject to second-stage competition and further detail regarding those terms and conditions, where necessary;

(ii) A restatement of the procedures and criteria for the award of the anticipated procurement contract, including their relative weight and the manner of their application;

(iii) Instructions for preparing submissions;

(iv) The manner, place and deadline for presenting submissions;

(v) If suppliers or contractors are permitted to present submissions for only a portion of the subject matter of the procurement, a description of the portion or portions for which submissions may be presented;

(vi) The manner in which the submission price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(vii) Reference to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where those laws and regulations may be found;

(viii) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the second-stage competition without the intervention of an intermediary;

(ix) Notice of the right provided under article 64 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and the reasons therefor;

(x) Any formalities that will be required once a successful submission has been accepted for a procurement contract to enter into force, including, where

applicable, the execution of a written procurement contract pursuant to article 22 of this Law;

(xi) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of submissions and to other aspects of the second-stage competition;

(c) The procuring entity shall evaluate all submissions received and determine the successful submission in accordance with the evaluation criteria and the procedures set out in the invitation to present submissions;

(d) The procuring entity shall accept the successful submission in accordance with article 22 of this Law.

Article 63

Changes during the operation of a framework agreement

During the operation of a framework agreement, no change shall be allowed to the description of the subject matter of the procurement. Changes to other terms and conditions of the procurement, including to the criteria (and their relative weight and the manner of their application) and procedures for the award of the anticipated procurement contract, may occur only to the extent expressly permitted in the framework agreement.

Chapter VIII. Challenge proceedings[68]

Article 64

Right to challenge and appeal

1. A supplier or contractor that claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the procuring entity with the provisions of this Law may challenge the decision or action concerned.

2. Challenge proceedings may be made by way of [an application for reconsideration to the procuring entity under article 66 of this Law, an application for review to the [*name of the independent body*] under article 67 of this Law or an application or appeal to the [*name of the court or courts*]].

[3. A supplier or contractor may appeal any decision taken in challenge proceedings under article 66 or 67 of this Law in the [*name of the court or courts*]].

[68] Certain options are presented in this Chapter in square brackets. See the Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/...) for guidance on those options.

Article 65

Effect of a challenge

1. The procuring entity shall not take any step that would bring into force a procurement contract or framework agreement in the procurement proceedings concerned:

(a) Where it receives an application for reconsideration within the time limits specified in paragraph 2 of article 66;

(b) Where it receives notice of an application for review from the [*name of the independent body*] under paragraph 5 (b) of article 67; or

(c) Where it receives notice of an application or of an appeal from the [*name of the court or courts*].

2. The prohibition referred to in paragraph 1 shall lapse ... working days [*the enacting State specifies the period*] after the decision of the procuring entity, the [*name of the independent body*] or the [*name of the court or courts*] has been communicated to the applicant or appellant, as the case may be, to the procuring entity, where applicable, and to all other participants in the challenge proceedings.

3. (a) The procuring entity may at any time request the [*name of the independent body*] or the [*name of the court or courts*] to authorize it to enter into the procurement contract or framework agreement on the ground that urgent public interest considerations so justify;

(b) The [*name of the independent body*], upon consideration of such a request [, or of its own motion,] may authorize the procuring entity to enter into the procurement contract or framework agreement where it is satisfied that urgent public interest considerations so justify. The decision of the [*name of the independent body*] and the reasons therefor shall be made part of the record of the procurement proceedings, and shall promptly be communicated to the procuring entity, to the applicant, to all other participants in the challenge proceedings and to all other participants in the procurement proceedings.

Article 66

Application for reconsideration before the procuring entity

1. A supplier or contractor may apply to the procuring entity for a reconsideration of a decision or an action taken by the procuring entity in the procurement proceedings.

2. Applications for reconsideration shall be submitted to the procuring entity in writing within the following time periods:

(a) Applications for reconsideration of the terms of solicitation, pre-qualification or pre-selection or decisions or actions taken by the procuring entity in pre-qualification or pre-selection proceedings shall be submitted prior to the deadline for presenting submissions;

(b) Applications for reconsideration of other decisions or actions taken by the procuring entity in the procurement proceedings shall be submitted within the standstill period applied pursuant to paragraph 2 of article 22 of this Law, or, where

none has been applied, prior to the entry into force of the procurement contract or the framework agreement.

3. Promptly after receipt of the application, the procuring entity shall publish a notice of the application and shall, not later than three (3) working days after receipt of the application:

(a) Decide whether the application shall be entertained or dismissed and, if it is to be entertained, whether the procurement proceedings shall be suspended. The procuring entity may dismiss the application if it decides that the application is manifestly without merit, the application was not submitted within the deadlines set out in paragraph 2 of this article or the applicant is without standing. Such a dismissal constitutes a decision on the application;

(b) Notify all participants in the procurement proceedings to which the application relates about the submission of the application and its substance;

(c) Notify the applicant and all other participants in the procurement proceedings of its decision on whether the application is to be entertained or dismissed;

(i) If the application is to be entertained, the procuring entity shall in addition advise whether the procurement proceedings are suspended and, if so, the duration of the suspension;

(ii) If the application is to be dismissed or the procurement proceedings are not suspended, the procuring entity shall in addition advise the applicant of the reasons for its decision.

4. If the procuring entity does not give notice to the applicant as required in paragraphs 3 (c) and 8 of this article within the time-limit specified in paragraph 3 of this article, or if the applicant is dissatisfied with the decision so notified, the applicant may immediately thereafter commence proceedings [in the [*name of the independent body*] under article 67 of this Law or in the [*name of the court or courts*]]. Where such proceedings are commenced, the competence of the procuring entity to entertain the application ceases.

5. In taking its decision on an application that it has entertained, the procuring entity may overturn, correct, vary or uphold any decision or action taken in the procurement proceedings to which the application relates.

6. The decision of the procuring entity under paragraph 5 of this article shall be issued within ... working days [*the enacting State specifies the period*] after receipt of the application. The procuring entity shall immediately thereafter communicate the decision to the applicant, to all other participants in the challenge proceedings and to all other participants in the procurement proceedings.

7. If the procuring entity does not communicate its decision to the applicant in accordance with the requirements of paragraphs 6 and 8 of this article, the applicant is entitled immediately thereafter to commence proceedings [in the [*name of the independent body*] under article 67 of this Law or in the [*name of the court or courts*]]. Where such proceedings are commenced, the competence of the procuring entity to entertain the application ceases.

8. All decisions of the procuring entity under this article shall be in writing, shall state the action taken and the reasons therefor, and shall promptly be made part of the record of the procurement proceedings, together with the application received by the procuring entity under this article.

Article 67

Application for review before an independent body

1. A supplier or contractor may apply to the [*name of the independent body*] for review of a decision or an action taken by the procuring entity in the procurement proceedings, or of the failure of the procuring entity to issue a decision under article 66 of this Law within the time limits prescribed in that article.

2. Applications for review shall be submitted to the [*name of the independent body*] in writing within the following time periods:

(a) Applications for review of the terms of solicitation, pre-qualification or pre-selection or of decisions or actions taken by the procuring entity in pre-qualification or pre-selection proceedings shall be submitted prior to the deadline for presenting submissions;

(b) Applications for review of other decisions or actions taken by the procuring entity in the procurement proceedings shall be submitted:

(i) Within the standstill period applied pursuant to paragraph 2 of article 22 of this Law; or

(ii) Where no standstill period has been applied, within ... working days [*the enacting State specifies the period*] after the time when the applicant became aware of the circumstances giving rise to the application or when the applicant should have become aware of those circumstances, whichever is earlier, but not later than ... working days [*the enacting State specifies the period*] after the entry into force of the procurement contract or the framework agreement [or a decision to cancel the procurement];

(c) Notwithstanding subparagraph (b) (i) of this paragraph, a supplier or contractor may request the [*name of the independent body*] to entertain an application for review filed after the expiry of the standstill period, but not later than ... working days [*the enacting State specifies the period*] after the entry into force of the procurement contract or the framework agreement [or a decision to cancel the procurement], on the ground that the application raises significant public interest considerations. The [*name of the independent body*] may entertain the application where it is satisfied that significant public interest considerations so justify. The decision of the [*name of the independent body*] and the reasons therefor shall promptly be communicated to the supplier or contractor concerned;

(d) Applications for review of the failure of the procuring entity to issue a decision under article 66 of this Law within the time limits prescribed in that article shall be submitted within ... working days [*the enacting State specifies the period*] after the decision of the procuring entity should have been communicated to the applicant in accordance with the requirements of paragraphs 3, 6 and 8 of article 66 of this Law, as appropriate.

3. Following receipt of an application for review, the [*name of the independent body*] may, subject to the requirements of paragraph 4 of this article:

[(a)] Order the suspension of the procurement proceedings at any time before the entry into force of the procurement contract; [and

(b) Order the suspension of the performance of a procurement contract or the operation of a framework agreement that has entered into force;]

if and for as long as it finds such a suspension necessary to protect the interests of the applicant unless the [*name of the independent body*] decides that urgent public interest considerations require the procurement proceedings[, the procurement contract or the framework agreement, as applicable,] to proceed. The [*name of the independent body*] may also order that any suspension applied be extended or lifted, taking into account the aforementioned considerations.

4. The [*name of the independent body*] shall:

(a) Order the suspension of the procurement proceedings for a period of ten (10) working days where an application is received prior to the deadline for presenting submissions; and

(b) Order the suspension of the procurement proceedings [or the performance of a procurement contract or the operation of a framework agreement, as the case may be] where an application is received after the deadline for presenting submissions and where no standstill period has been applied;

unless the [*name of the independent body*] decides that urgent public interest considerations require the procurement proceedings[, the procurement contract or the framework agreement, as applicable,] to proceed.

5. Promptly upon receipt of the application, the [*name of the independent body*] shall:

(a) Suspend or decide not to suspend the procurement proceedings [or the performance of a procurement contract or the operation of a framework agreement, as the case may be] in accordance with paragraphs 3 and 4 of this article;

(b) Notify the procuring entity and all identified participants in the procurement proceedings to which the application relates of the application and its substance;

(c) Notify all identified participants in the procurement proceedings to which the application relates of its decision on suspension. Where the [*name of the independent body*] decides to suspend the procurement proceedings [or the performance of a procurement contract or the operation of a framework agreement, as the case may be], it shall in addition specify the period of the suspension. Where it decides not to suspend them, it shall provide the reasons for its decision to the applicant and to the procuring entity; and

(d) Publish a notice of the application.

6. The [*name of the independent body*] may dismiss the application and shall lift any suspension applied, where it decides that:

(a) The application is manifestly without merit or was not presented in compliance with the deadlines set out in paragraph 2 of this article; or

(b) The applicant is without standing.

The [*name of the independent body*] shall promptly notify the applicant, the procuring entity and all other participants in the procurement proceedings of the dismissal and the reasons therefor and that any suspension in force is lifted. Such a dismissal constitutes a decision on the application.

7. The notices to the applicant, the procuring entity and other participants in the procurement proceedings under paragraphs 5 and 6 of this article shall be given no later than three (3) working days after receipt of the application.

8. Promptly upon receipt of a notice under paragraph 5 (b) of this article, the procuring entity shall provide the [*name of the independent body*] with effective access to all documents relating to the procurement proceedings in its possession, in a manner appropriate to the circumstances.

9. In taking its decision on an application that it has entertained, the [*name of the independent body*] may declare the legal rules or principles that govern the subject matter of the application, shall address any suspension in force and shall take one or more of the following actions, as appropriate:

(a) Prohibit the procuring entity from acting, taking a decision or following a procedure that is not in compliance with the provisions of this Law;

(b) Require the procuring entity that has acted or proceeded in a manner that is not in compliance with the provisions of this Law to act, to take a decision or to proceed in a manner that is in compliance with the provisions of this Law;

[(c) Overturn in whole or in part an act or a decision of the procuring entity that is not in compliance with the provisions of this Law [other than any act or decision bringing the procurement contract or the framework agreement into force];

(d) Revise a decision by the procuring entity that is not in compliance with the provisions of this Law [other than any act or decision bringing the procurement contract or the framework agreement into force];

(e) Confirm a decision of the procuring entity;

(f) Overturn the award of a procurement contract or a framework agreement that has entered into force in a manner that is not in compliance with the provisions of this Law and, if notice of the award of the procurement contract or the framework agreement has been published, order the publication of notice of the overturning of the award;]

(g) Order that the procurement proceedings be terminated;

(h) Dismiss the application;

(i) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting an application as a result of an act or decision of, or procedure followed by, the procuring entity in the procurement proceedings that is not in compliance with the provisions of this Law, and for any loss or damages suffered[, which shall be limited to the costs of the preparation of the submission or the costs relating to the application, or both]; or

(j) Take such alternative action as is appropriate in the circumstances.

10. The decision of the [*name of the independent body*] under paragraph 9 of this article shall be issued within ... working days [*the enacting State specifies the period*] after receipt of the application. The [*name of the independent body*] shall immediately thereafter communicate the decision to the procuring entity, to the applicant, to all other participants in the application for review and to all other participants in the procurement proceedings.

11. All decisions of the [*name of the independent body*] under this article shall be in writing, shall state the action taken and the reasons therefor and shall promptly be made part of the record of the procurement proceedings, together with the application received by the [*name of the independent body*] under this article.

Article 68

Rights of participants in challenge proceedings

1. Any supplier or contractor participating in the procurement proceedings to which the application relates, as well as any governmental authority whose interests are or could be affected by the application, shall have the right to participate in challenge proceedings under articles 66 and 67 of this Law. A supplier or contractor duly notified of the proceedings that fails to participate in such proceedings is barred from subsequently challenging under articles 66 and 67 of this Law the decisions or actions that are the subject matter of the application.

2. The procuring entity shall have the right to participate in challenge proceedings under article 67 of this Law.

3. The participants in challenge proceedings under articles 66 and 67 of this Law shall have the right to be present, represented and accompanied at all hearings during the proceedings; the right to be heard; the right to present evidence, including witnesses; the right to request that any hearing take place in public; and the right to seek access to the record of the challenge proceedings subject to the provisions of article 69 of this Law.

Article 69

Confidentiality in challenge proceedings

No information shall be disclosed in challenge proceedings and no public hearing under articles 66 and 67 of this Law shall take place if so doing would impair the protection of essential security interests of the State, would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition.

Annex II

List of documents before the Commission at its forty-fourth session

Symbol	*Title or description*
A/CN.9/711 and Corr.1	Provisional agenda, annotations thereto and scheduling of meetings of the forty-fourth session
A/CN.9/712	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4-8 October 2010)
A/CN.9/713	Report of Working Group I (Procurement) on the work of its nineteenth session (Vienna, 1-5 November 2010)
A/CN.9/714	Report of Working Group VI (Security Interests) on the work of its eighteenth session (Vienna, 8-12 November 2010)
A/CN.9/715	Report of Working Group V (Insolvency Law) on the work of its thirty-ninth session (Vienna, 6-10 December 2010)
A/CN.9/716	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13-17 December 2010)
A/CN.9/717	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (New York, 7-11 February 2011)
A/CN.9/718	Report of Working Group I (Procurement) on the work of its twentieth session (New York, 14-18 March 2011)
A/CN.9/719	Report of Working Group VI (Security Interests) on the work of its nineteenth session (New York, 11-15 April 2011)
A/CN.9/720	Note by the Secretariat on comparison and analysis of major features of international instruments relating to secured transactions
A/CN.9/721	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-third session (New York, 23-27 May 2011)
A/CN.9/722	Note by the Secretariat on bibliography of recent writings related to the work of UNCITRAL
A/CN.9/723	Note by the Secretariat on the status of conventions and model laws
A/CN.9/724	Note by the Secretariat on technical cooperation and assistance
A/CN.9/725	Note by the Secretariat on coordination activities
A/CN.9/726	Note by the Secretariat on the promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts
A/CN.9/727	Note by the Secretariat on legal and regulatory issues surrounding microfinance
A/CN.9/728 and Add.1	Note by the Secretariat on present and possible future work on electronic commerce
A/CN.9/729 and Add.1-8	Note by the Secretariat on the draft revised text of the Model Law
A/CN.9/730 and Add.1 and 2	Note by the Secretariat on the finalization and adoption of the UNCITRAL Model Law on Public Procurement: compilation of comments by Governments and international organizations on the draft Model Law on Public Procurement
A/CN.9/731 and Add.1-9	Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement

Symbol	*Title or description*
A/CN.9/732 and Add.1-3	Note by the Secretariat on judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency
A/CN.9/733 and Add.1	Note by the Secretariat on judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency: compilation of comments by Governments
A/CN.9/734	Note by the Secretariat transmitting a proposal by the United Nations Conference on Trade and Development on strengthening awareness and use of alternative dispute resolution methods in the settlement of investment disputes